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Supreme Court, U.S.
FILED
DEC 16 1986
JOSEPH F. SPANIOL, JR.
CLERK

NO. 85-2068

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

CONSTABLE WALTER H. RANKIN
and HARRIS COUNTY, TEXAS,
Petitioners

v.

ARDITH McPHERSON,
Respondent

On Writ Of Certiorari To The United States Court of Appeals For The Fifth Circuit

JOINT APPENDIX

ANNIE S. GARCY*
4848 Loop Central
Suite 800
Houston, Texas 77081
(713) 669-9902

BRUCE V. GRIFFITHS
1236 West Gray
Houston, Texas 77019
(713) 524-5925

Attorneys for Respondent

MIKE DRISCOLL*
County Attorney
Harris County, Texas

BILLY E. LEE
Assistant County Attorney
1001 Preston
Suite 634
Houston, Texas 77002
(713) 221-5101

Attorneys for Petitioners

*Counsel of Record

Alpha Law Brief Co., Inc. — 8748 Westpark — Houston, Texas 77063 — 789-2000

PETITION FOR CERTIORARI FILED JUNE 17, 1986

CERTIORARI GRANTED OCTOBER 20, 1986

140 PP

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-81-1442

ARDITH McPHERSON,
Plaintiff,

v.

WALTER RANKIN, Individually and in his Official Capacity as Constable, Precinct One (1), of Harris County, Texas; and

HARRIS COUNTY, TEXAS,
Defendants.

REOPENED—4-17-86

CAUSE

Violation of 1st and 14th Amendments
42 U.S.C. 1983 and 1988

ATTORNEYS

Bruce Griffiths
Greater Houston Civil Liberties Union
1236 West Gray
Houston, Texas 77019
524-5925

Annie S. Garcy
4848 Loop Central Dr.
Suite 800
Houston, Texas 77081
669-9902

Both Defts

Billy E. Lee in charge
Dori Wind
Donald W. Jackson
Assistant County Attorney
634 Harris County Admin. Bldg.
Houston, Texas 77002
221-5101

DISTRICT COURT'S DOCKET ENTRIES

DATE	NR.	PROCEEDINGS
6- 5-81	1	ORIGINAL COMPLAINT, filed.
6- 5-81	2	MOTION and ORDER appointing Ms. Abbey Padgett as process server, filed.
6- 5-81		SUMMONS (2) issued on Defts.
6-16-81		RETURN of Summons issued the following, filed. pj
	3	Harris County served by Pat Krischke f/Judge Lindsay on Jun 5, 1981.
	4	Walter Rankin served on Jun 15, 1981. DD 6-17-81
6-25-81	5	DEFENSE of Constable Walter Rankin, filed. pj DD 6-26-81
6-25-81	6	DEFENSE of Harris County, filed. pj DD 6-26-81
5-11-82	7	Pltf's FIRST REQUEST FOR PRODUCTION OF DOC. to defts., filed. aa
7-30-82	8	(NWB) ORDER, filed. Parties ntfd. PB Joint PTO due & Docket Call set for Sept 7, 1982, 9:30 a.m. dj Dkt'd 8-7-82
8-13-82	9	Pltf's MOTION FOR A SUMMARY JUDGMENT W/EXHIBITS, filed. aa
8-13-82	10	Pltf's MEMORANDUM OF LAW in support of motion for summary judgment, filed. aa M/D Sep 7, 1982, by clerk.

DATE	NR.	PROCEEDINGS
8-24-82	11	Pltf's MOTION FOR EXTENSION OF TIME in which to file pretrial order, filed. rj (unopposed) Dkt'd 8-30-82
9- 2-82		Rec'd and forwarded Pltf's Motion for Extension of Time. dd
9- 9-82	12	(NWB) Minutes of Chambers Conference, filed. Motion for Summary Judgment is under advisement as of 9-20-82. Amended DCO Discovery 12-1-82 Motions and PTO 12-15-82 Docket Call 12-27-82 dd Dkt'd 9-13-82
9-17-82	13	Deft. Rankin's OPPOSITION to Pltf's Motion for Summary Judgment. Filed. dd Dkt'd 9-21-82
9-24-82	14	Pltf's RESPONSE to Constable Rankin's Opposition to Motion for Summary Judgment. Filed dd
10- 8-82	15	Pltf's FIRST INTERROGATORIES to defts, filed. pj Dkt'd 10-15-82
10-25-82	16	Deft's RESPONSE to first set of interrogatories, filed. dm
12- 6-83	17	(NWB) ORDER, filed. Parties ntfd. pb/deg Cases listed set for Docket Call on Jan 3, 1983, 9:30 a.m.

DATE	NR.	PROCEEDINGS
		Pltf responsible for filing Joint Pretrial Order on or before Jan 3, 1983. Dkt'd 1-6-83
1- 3-83	18	(NWB) *MINUTES OF DOCKET CALL,* filed. aa (Rptr Starkie) Appearances: Pltf = Annie Garcy deft = Bill Lee ETT: 1 day trial to be set after ruling on MSJ.
1-10-83	19	(NWB) ORDER, filed, Parties ntfd. deg Hearings on cross-motions for summary judgment set for Jan 28, 1983.
2-14-83	20	(NWB) MINUTES OF HEARING, filed. (Rptr Schaefer) Appearances: Pltf-Annie Garcy, Steffan Presser; Deft-Billy Lee, Anthony Loira Presser; Deft-Billy Lee, Anthony Loria (1) Ardith McPherson, (2) Lawrence Jackson, (3) Hiedi Cornelison Hinojosa. Pltf rests. Deft's case begins. (1) Nell Sanford, (2) Capt. John M. LeVrier, (3) Capt. Jack Abercia, (4) Constable Walter F. Rankin. Defense Rests. Pltf's Motion for Judgent DENIED. Deft's Motion for Summary Judgment GRANTED. pb/dec Dkt'd 2-22-83
2-28-83	21	Pltf's REQUEST FOR FINDINGS OF FACT & CONCLUSIONS OF LAW, filed. dec Dkt'd 3-1-83

DATE	NR.	PROCEEDINGS
4-12-83	22	TRANSCRIPT of Feb 14, 1983 Hearing on Motion for Summary Judgment, filed. dec
4-15-83	23	(Vacated per order of 6-16-83)
4-15-83	24	(NWB) ORDER, filed. Parties ntfd. aa Dkt'd 4-21-83 FINDINGS OF FACT & CONCLUSIONS OF LAW. (claims denied)
6-14-83	25	Pltf MOTION for Extension of Time to File Notice of Appeal with Affidavit, filed. mac
6-16-83	26	(NWB) ORDER, filed. Parties ntfd. dec This Court's Final Judgment of Apr 15, 1983 is vacated and re-entered by Clerk on this date. Dkt'd 6-21-83
6-16-83	27	(NWB) FINAL JUDGMENT, filed. Parties ntfd. aa/dec Pltf's claims for relief are in all ways denied. Dkt'd 6-21-83
6-24-83	28	Pltf. NOTICE OF APPEAL to Final Judgment entered June 16, 1983, filed. mac
6-24-83		Filing & Docketing Fees both paid. (Rcpt. #77034) mac
7- 1-83		RECORD ON APPEAL consisting of all original papers (1 vol) and transcript (1 vol) sent to Ct of Appeals. tf (2 vols)

DATE	NR.	PROCEEDINGS
7- 5-83	29	APPEAL INFORMATION SHEET advising transcript already on file, filed. tf
8- 9-84	30	Certified copy of JUDGMENT by Court of Appeals on 7-12-84 and issued as MANDATE 8-3-84, VACATED, and that this cause be, & the same is hereby REMANDED to the said District Court in accordance w/the opinion of this Court; It is FURTHER ORDERED that defts-appellees pay to pltf-appellant the costs on appeal, filed. bb
8- 9-84	31	Certified copy of OPINION by Court of Appeals, filed. bb
8- 9-84		CASE REOPENED
8- 9-84		Record on Appeal RETURNED by Court of Appeals, file reassembled and place on Paul Brezik's desk. bb
9-11-84	32	(NWB) ORDER, filed. Parties ntfd. pb/dm 1. PRETRIAL CONFERENCE on Oct 2, 1984 at 9:00 a.m. Dkt'd 9-13-84
9-27-84	33	Pltf's NOTICE OF DEPOSITION set for Walter Rankin to be taken on Oct 26, 1984 at 1:00 p.m., filed. dm Dkt'd 9-27-84
10- 2-84	34	(NWB) MINUTES OF PRETRIAL CONFERENCE, filed. dm

DATE	NR.	PROCEEDINGS
		1. Discovery may continue until Nov 15, 1984. 2. Case will be ready f/trial thereafter. Set for trial 12/10/84 at 9:30 a.m. Dkt'd 10-4-84
1-15-85	35	Pltf's PRETRIAL MEMORANDUM on the First Amendment and Protected Speech, filed. dm
1-15-85	36	Pltf's PROPOSED FINDINGS OF FACT & CONCLUSIONS OF LAW, filed. dm Dkt'd 1-15-85
1-21-85	37	(NWB) *COURT TRIAL, filed.* (Rptr J. Simon) dm Appearances: Pltf Bruce Griffiths & Annie Garcy; Deft Billy E. Lee. Pltf evidence begin. Pltf rest. Defts evidence begin. Deft rest. Final argument of pltf. Final Argument of deft. Court rules in favor of deft. ADJOURNED. Dkt'd 1-22-85
2- 4-85	38	(NWB) FINAL JUDGMENT, filed. Parties ntfd. dm 1. Judgment is entered f/defts. 2. Pltf's claims are denied. 3. Each party to bear their own costs. Dkt'd 2-4-85
2-15-85	39	Pltf's NOTICE OF APPEAL from Judgment entered on Feb. 4, 1985, filed. bb
2-15-85		Filing & Docketing Fee's BOTH paid # 110939. bb

DATE	NR.	PROCEEDINGS
3-11-85	40	Letter from Court of Appeals to Court Reporter (June Simon) advising transcript due for filing on Apr 26, 1985, filed. mac
5-22-85	41	Court Reporter's TRANSCRIPT OF PROCEEDINGS on Jan 21, 1985, filed. (1 Vol.) Paid & Dkt'd 5-31-85 mac
6- 3-85		RECORD ON APPEAL consisting of All Original Papers (1 Vol.) Transcripts (2 Vols.) forward to the Court of Appeals. bb
8-14-85	42	Deft's Trial EXHIBITS, filed. br. (per Paul B. instruction)
8-14-85		SUPPLEMENTAL RECORD consisting of Deft's Trial Exhibits forward to the Court of Appeals. br
4-17-86	43	Certified copy of JUDGMENT by Court of Appeals on Mar 19, 1986 and issued as MANDATE Apr. 15, 1986, REVERSING and REMANDING to District Court for further proceedings and FURTHER ORDERED that Defts-Appellees pay to Pltf-Appellant the costs on Appeal, filed. Dkt'd 4-18-86 mac
4-17-86	44	Certified copy of OPINION by Court of of Appeals, filed. mac
4-17-86		Record on Appeal RETURNED by Court of Appeals, reassembled and given to Paul as case is reopened. mac
4-17-86		CASE REOPENED. mac

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-81-1442

ARDITH McPHERSON,
Plaintiff,

vs.

WALTER RANKIN, Individually and in his Official Capacity as Constable, Precinct One (1), of Harris County, Texas; and
HARRIS COUNTY, TEXAS,
Defendants.

ORIGINAL COMPLAINT

I.

INTRODUCTORY STATEMENT

1. Plaintiff seeks to enjoin Defendants from conditioning continuing public employment on espousal of only those personal or political opinions and ideas found acceptable to the Constable. Plaintiff also seeks declaratory judgment and damages, based upon Defendants' violation of rights guaranteed her under the First Amendment to the Constitution of the United States, which guarantees the right to speech.

II.

JURISDICTION

2. Plaintiff alleges that Defendants' actions have deprived her of rights secured her under the First and

Fourteenth Amendments to the Constitution of the United States, and further assured to her by 42 U.S.C. §§ 1983 and 1988, and corresponding provisions under Texas laws.

3. Pursuant to 28 U.S.C. § 1343(3) and (4), this Court has jurisdiction of any civil action commenced by a party which seeks redress of deprivation, under color of any state law, regulation, custom, or usage, of rights secured by the Constitution or laws of the United States protecting civil rights.

4. Pursuant to 28 U.S.C. §§ 2201 and 2202, this Court has jurisdiction to declare the rights of the parties, and to grant all further relief found necessary and proper.

III.

PARTIES

5. Plaintiff ARDITH McPHERSON is an adult citizen of the United States, and resident of Harris County, Texas.

6. Defendant WALTER RANKIN is Constable of Precinct One (1) of Harris County, Texas. He is an elected official, and is sued both individually and in his official capacity as Constable. Defendant may be served with process at his office address at the Harris County Criminal Courts Building, 301 San Jacinto, Houston, Texas.

7. Defendant HARRIS COUNTY, TEXAS, is a county of the State of Texas, and process may be had by serving its statutorily designated agent for service, The Honorable Jon Lindsey, County Judge of Harris County, Texas, whose address is on the top floor of the Harris

County Administration Building, 1001 Preston, Houston, Texas.

IV.

COLOR OF LAW

8. At all times mentioned herein, all Defendants acted under color of the laws, statutes, customs, usages, and regulations of the State of Texas, of Harris County, Texas, and of the office of Constable, Precinct One, of said County.

V.

FACTUAL ALLEGATIONS

9. Defendant WALTER RANKIN as elected Constable of Harris County, Texas, is authorized to hire subject to approval by said County, through its Commissioners Court. TEX. REV. CIV. STAT. ANN. art. 6879a, § 2 (Vernon 1960).

10. Defendant RANKIN is obligated by statute to perform all duties as may be required of him by law. TEX. REV. CIV. STAT. ANN. art. 6885 (Vernon 1960).

11. Plaintiff ARDITH McPHERSON was hired by Defendant RANKIN on January 14, 1981, as a Deputy Clerk of Harris County, Texas. Her job duties concerned entry of information about civil process into the computer records of said County.

12. During her employment with Harris County, Texas, Plaintiff satisfactorily performed her work, and continues to be ready, willing and able to perform said job duties.

13. On Monday, March 30, 1981, an assassination attempt was made on the President of the United States.

14. Plaintiff first learned of the attempt as a result of a radio broadcast on said date, during a time that the Constable's office in which Plaintiff was sitting was emptied for lunch.

15. Upon hearing the news of the assassination attempt, Plaintiff and another employee of said Constable's office began a private discussion concerning the current administration of President Reagan, and its proposed budget reductions, and the employees discussed how proposed money cuts would generate anger in this Country.

16. During the course of said private discussion, Plaintiff stated to the other employee, "I hope if they go for him [President Reagan] again, they get him," and the conversation turned to other personal topics.

17. Said verbal statement made by Plaintiff was overheard by a Captain Levrier, and Plaintiff alleges on knowledge and belief that said Captain reported Plaintiff's statement to Defendant RANKIN.

18. Plaintiff meanwhile returned to her work, and continued to work at the computer terminal.

19. Shortly after, Plaintiff was summoned to Defendant RANKIN'S office by Deputy Constable Jack Albercia.

20. In Defendant RANKIN's office, said Defendant RANKIN informed Plaintiff that his office is "for Reagan," and further, that he would not tolerate expression of any opinions against President Reagan.

21. Plaintiff attempted to explain her comment, but Defendant RANKIN would not allow Plaintiff to respond.

22. Defendant RANKIN immediately thereafter terminated Plaintiff's employment with Harris County, and instructed an employee to remove Plaintiff's name from the payroll.

23. Plaintiff returned to the Constable's office the next day, to discuss her termination. Defendant RANKIN, however, would not speak with Plaintiff, and, after waiting for hours, Plaintiff abandoned hopes of speaking with Defendant RANKIN, and left the office.

24. Plaintiff alleges, on knowledge and belief, that sometime during the week of March 30, 1981, Defendant RANKIN informed the news media of the firing of Plaintiff based upon her spoken words, and said information was broadcasted and published in the media.

25. Plaintiff has attempted to regain her job position by contacting the Harris County Personnel Office, the Harris County Commissioners' Court, and the Harris County Attorney's office, all without success.

VI.

CLAIMS FOR RELIEF

26. Defendants' actions described above were arbitrary, capricious, and in willful violation of Plaintiff's freedom of speech, in that Plaintiff was terminated based upon expression of personal and political opinion, said expression being in the context of a private conversation, thus Defendants violated Plaintiff's rights under the First and Fourteenth Amendments to the United States Con-

stitution, and deprived Plaintiff of rights secured by 42 U.S.C. § 1983.

In publishing the termination of Plaintiff, Defendant RANKIN has wantonly caused Plaintiff public humiliation which has further caused Plaintiff grave mental anguish.

In terminating Plaintiff for her expression of free speech, Defendants have damaged Plaintiff's good name, reputation, honor, and integrity, all in violation of Plaintiff's right to liberty, guaranteed by the Fourteenth Amendment to the United States Constitution. Yet, Plaintiff has never received notice and an opportunity to be heard, and to refute or disprove Defendants' bases for terminating her employment, in violation of Plaintiff's right to due process of law, guaranteed by the same Fourteenth Amendment to the United States Constitution, and 42 U.S.C. § 1983.

RELIEF REQUESTED

Plaintiff requests that each Defendant be cited to appear and answer herein, that this cause be expedited for trial and that, upon trial of this action, the Court grant Plaintiff the following relief against Defendants, jointly and severally:

A. Adjudge and declare that Defendants' actions are in violation of the First and Fourteenth Amendments to the United States Constitution, and 42 U.S.C. § 1983; and

B. Incident to such declaration, and in exercise of its equitable powers, this Court order that Defendants reinstate Plaintiff to her job position; and

C. Order that Defendants publicize Plaintiff's reinstatement and advise the news media of such action; and

D. Award Plaintiff back pay for the time during which she was not employed by Defendants;

E. Permanently enjoin Defendants from conditioning employment with said Harris County, Texas, Constable's office on the expression of only those ideas found personally acceptable by said Defendant RANKIN;

F. Permanently enjoin Defendants from again summarily terminating employees with said Harris County, Texas Constable's office based on expression of ideas found personally unacceptable by said Defendant RANKIN, without notice and hearing; and

G. Award Plaintiff her costs of court and reasonable attorneys' fees; and

G. Grant such other relief as may be just and proper in the opinion of this Court.

Respectfully submitted,

/s/ STEFAN PRESSER,
Stefan Presser,
Attorney-in-Charge for Plaintiff
Greater Houston Civil Liberties Union
1236 West Gray
Houston, Texas 77019
713/524-5925

/s/ ANNIE S. GARCY
Annie S. Garcy,
Co-Counsel for Plaintiff
1110 Autrey
Houston, Texas 77006
713/523-7434

/s/ CHARLES A. BROWN
Charles A. Brown,
Co-Counsel for Plaintiff
608 Fannin, Suite 1710
Houston, Texas 77002
713/228-8000

OF COUNSEL:

AMERICAN CIVIL LIBERTIES UNION

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-81-1442

ARDITH McPHERSON

v.

CONSTABLE WALTER RANKIN
and HARRIS COUNTY, TEXAS

DEFENSE OF CONSTABLE WALTER RANKIN

MIKE DRISCOLL
County Attorney of
Harris County, Texas

DORI WIND
Assistant County Attorney

DONALD W. JACKSON
Assistant County Attorney

BILLY E. LEE Lead Counsel
Assistant County Attorney
634 Harris County Administration
Bldg.
Houston, TX 77002
(713) 221-5101

ATTORNEYS FOR DEFEND-
ANT CONSTABLE WALTER
H. RANKIN

FILED: 25 JUNE 1981

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-81-1442

ARDITH McPHERSON

v.

CONSTABLE WALTER RANKIN
and HARRIS COUNTY, TEXAS

DEFENSE OF CONSTABLE WALTER RANKIN

Comes now Constable Walter H. Rankin, named and cited as one of the defendants in the above numbered and entitled cause in which plaintiff is Ardith McPherson. For his defense to the charges alleged against him in the Complaint defendant Constable Rankin would show unto the Court that:

I

Constable Rankin is the duly elected, qualified and acting Constable in and for Precinct No. 1 of Harris County, Texas, and was acting in such office and capacity at all times alleged in plaintiff's Complaint. Included in Precinct No. 1 is the downtown County Courthouse Complex. Housed here is the District Clerk, who issues all processes from the 30 District Courts that have civil jurisdiction; the County Clerk, who issues all processes from the 4 County Civil Courts at Law, the 3 Probate Courts, and Commissioners Court; and two Justices of the Peace, who issue all processes from their respective Justice Courts. As the only Constable housed in the down-

town County Courthouse Complex, this officer receives all processes from the respective issuing officials. This officer then enters the identifying information from each process into a Data Entry computer of the Harris County Civil Process Tracking Center, together with the date of its origination and the proper Constable's Precinct to which it will be routed for execution. After posting in the Data Entry computer, each process is then forwarded by this officer to the Constable in the Precinct in which it is to be executed. Each of the other seven Constables in Harris County has a terminal tied to the Data Entry computer in this officer's office and each adds to the computer history by entering all subsequent steps taken with each process paper through its execution and return to the issuing Court. The volume of Court processes handled each month by this officer exceeds 16,000, of which in excess of 6,000 papers are executed in his Precinct No. 1. To enable him to perform the duties of Constable in Precinct No. 1, Commissioners Court has authorized him to employ about 80 deputies and clerks. Of some 80 employees, more than 50 are deputies—certified law enforcement officers as defined by Legislative enactments. More than 20 persons are employed as clerks—answering the 15 telephone lines, sorting mail, secretaries, typists, bookkeepers, and computer clerks. This officer has need for 6 computer clerks and a supervisor working with the Data Entry input into the computer system of the Harris County Civil Process Tracking System.

II

On January 12, 1981, Ardith Sharese McPherson made application to this officer for employment as a clerk in his office. A contract of employment was signed by her

and this officer that same date, to become effective January 14, 1981. A xerox copy of the signed Application for, and Contract of, Employment is attached hereto as EXHIBIT A and incorporated herein by reference. In the center of said Contract, over the signature of plaintiff, is the following statement: "I have read, understand, and accept the terms and conditions of this employment as recited above and in the personnel regulations adopted by the Commissioners Court. I understand that my employment may be terminated at will by my employer without notice, without vacation, and without payment for overtime."

Just below plaintiff's signature on the said Contract, is the following statement, with emphasis supplied by counsel drafting this pleading: "I, Walter H. Rankin, Constable, Precinct #1 of the County of Harris and State of Texas, HAVING FULL CONFIDENCE IN ARDITH S. McPHERSON of the said County and State, do hereby, with the consent of the Commissioners' Court of Harris County, Texas, duly entered of record _____, 19____ nominate and appoint him, the said Ardith S. McPherson, my true and lawful deputy, in my name, place and stead, to do and perform any and all acts and things pertaining to the office of said Constable, Precinct #1 of the County and State, hereby ratifying and confirming any and all such acts and things lawfully done in the premises by virtue thereof. Payment of payrolls is to be in accordance with the personnel regulations adopted by the Commissioners Court." The Deputation is dated and is signed by this officer in his official signature.

Next below the Deputation plaintiff subscribed to the Oath of Office which is prescribed by Section 1 of Article

XVI of the Texas Constitution, as quoted herewith in part, counsel drafting the pleading again supplying the emphasis: "I, Ardith S. McPherson, do solemnly swear (or affirm) that I will faithfully execute the duties of Clerk of Harris County, Texas, and WILL TO THE BEST OF MY ABILITY PRESERVE, PROTECT AND DEFEND THE CONSTITUTION AND LAWS OF THE UNITED STATES AND OF THIS STATE; . . ."

III

At Paragraph V, subparagraph 16, of her Complaint, plaintiff judicially admits that, in referring to the assassination attempt on the President of the United States in which he was shot, she stated to a fellow employee: "I hope if they go for him (President Reagan) again, they get him." When questioned by this officer concerning the statement, plaintiff repeatedly admitted that she had made that statement and that she meant the statement and did not intend to retract it. This all occurred on Monday, March 30, 1981. This officer discharged plaintiff as his employee that day, without Seniority. The Change in Status of Employee indicating plaintiff's discharge as of that date was sent to the County Auditor and Commissioners Court over this officer's signature. A xerox copy is attached hereto as EXHIBIT B and is incorporated herein by reference.

IV

Constable Rankin employed Ardith McPherson on the same terms and conditions that are adopted by him for all his other employees, namely, that every employee is employed only for a 90 day probation period. At the end of the 90 day probation period, if the Constable, in con-

sultation with his supervisory deputies, is of the opinion that the probationary employee is or is not doing the assigned duties efficiently, he either terminates the employee or makes the temporary appointment permanent. At the time Ardith McPherson was terminated she had two weeks of her probation period remaining. She was being still trained to do her work and had not reached the point of efficiency and skill that her assigned duties could be performed by her without constant direction and supervision. The Constable had no complaints as to the quality of the work done by Ardith McPherson. She was a slow learner, as evidenced by the fact that she was still unable to handle her assignment without direction after two and a half months of training. She was a marginal employee and would not have been retained after her 90 day probationary period unless she developed her job skills very rapidly in her last two weeks of the period. The position of putting information into the Data Entry terminal by a computer clerk is one that requires both accuracy and speed by the clerk, without the need for direction from the other clerks, who have their own duties to perform.

V

Constable Rankin has been in law enforcement work 36 years, a career devoted to suppressing crime and criminals. As a part of his law enforcement duties he has been called many times to furnish security to protect the persons of noted people visiting the City of Houston and Harris County, including the President of the United States, Governors, Mayors, Cabinet officers, candidates for high offices entitled to security protection, and heads of state from foreign nations. As is common knowledge,

security officers furnishing protection to notables share the risk of danger along with the person they are protecting. In fact, two security officers protecting President Reagan on March 30, 1981, were shot while in the performance of their official duty. The risk goes with the badge.

VI

The Penal Code of Texas proscribes criminal homicide and provides penalties for its violation. Section 2385 of Title 18 of the United States Code makes it a violation of law for anyone knowingly or willfully to advocate the desirability or propriety of the assassination of ANY officer of government in the United States. Ardith McPherson breached her constitutional oath of office that she would to the best of her ability preserve, protect and defend the Constitution and laws of the United States and of Texas when she knowingly, willfully and repeatedly advocated the desirability or propriety of the assassination of President Reagan. This officer has been a life-long Democrat and as such did not support or vote for President Reagan, but the President is the only President that he—and the nation—now has. Not only is it contrary to both statutory and natural law to kill him or attempt to kill him, but it is a major defeat to the small "d" democratic processes to have one small mind wipe out the expressed will of the majority of the nation to the cheers of a small—fortunately—lunatic fringe that can't cope with the democratic process.

VII

When Constable Rankin questioned Ardith McPherson and she repeatedly assured him of the words she had

uttered and that she meant them, he lost confidence in her and in her ability to function as an important part of a team of a law enforcement agency created to suppress crime and criminals. Under the deputation given her by his appointment she was empowered to do and perform any and all acts and things pertaining to the office of Constable in his name, place and stead. Having lost confidence in McPherson because of her advocacy of criminal acts, it was his duty to revoke the authority of his office he had bestowed on her temporarily, and he did so. He would be breaching his duty to the people who elected him to office to enforce the law if he kept in office as his deputy one who espoused violation of the law rather than suppression of crime.

WHEREFORE, defendant Constable Rankin prays that after a hearing the Court will render judgment that plaintiff Ardith McPherson take nothing by her suit against this officer and that he go hence without day with costs.

MIKE DRISCOLL
County Attorney of
Harris County, Texas

/s/ DORI WIND
Dori Wind
Assistant County Attorney

/s/ DONALD W. JACKSON
Donald W. Jackson
Assistant County Attorney

/s/ BILLY E. LEE
Billy E. Lee Lead Counsel
Assistant County Attorney
634 Harris County Administration Bldg.
Houston, TX 77002
(713) 221-5101

ATTORNEYS FOR DEFENDANT CONSTABLE WALTER H. RANKIN

CERTIFICATE OF SERVICE

On this 25th day of June, 1981, I certify that I placed a signed true copy of the foregoing Defense of Constable Walter Rankin in the United States Mail Service with proper postable prepaid, addressed to each counsel of record for plaintiff:

Mr. Stefan Presser
Greater Houston Civil Liberties Union
1236 West Gray
Houston, TX 77019

Ms Annie S. Garcy
1110 Autrey
Houston, TX 77006

Mr. Charles A. Brown
608 Fannin, Suite 1710
Houston, TX 77002

/s/ BILLY E. LEE
Billy E. Lee
Assistant County Attorney

FOR AUDITOR'S USE ONLY:
Short Week Formula ___ Formula 2 ___
Car Allowance Formula ___
DATE EMPLOYED: (If other than effective date) / /

APPLICATION FOR, AND CONTRACT OF, EMPLOYMENT

☒ County Auditor / Commissioners' Court: County (County or Fixed Control) 2-06 (Budget Account)

Gentlemen:
I hereby apply for authority to make the following appointment, which is provided for by law and is essential to the efficient operation of this department, to become effective on 1 / 14 / 81 (Cannot be prior to approval by Auditor)

SOCIAL SECURITY NO. 098-56-3859
Name: Ardith Sharese McPherson (Name as full; no initials or abbreviations to be used) Ardith S. McPherson (Name desired to be used on County payroll and records)
Address: 12500 Dunlap #556 (Street and Number) Houston, Tx. 77035 (City) 728-1699 (Phone Number)
In emergency notify: Edith Melrose (Name) same (Address) 290-2474 Work
Statutory Authority For Appointment: 3912e-4D Duties: Clerical
☒ Title: Clerk Position Number: 0068 Period of Employment: Perm Rate of Salary: $ 1,079.00 per Month
☐ Replacement of: Anna M. Cardenas (Fill in "New Employment" or Name of Former Employee) Car Allowance Amount: $ ___
Room and Board Furnished: ___ (Enter: Yes or No)
Required Time: Minimum of 40 Hours a Week; on 8 Hours a Day; 5 Days a Week; ___ ("X" if as needed)
Automobile: (Check the condition applying to this position.)
The use of an automobile is not required X; the use of an automobile is required (a) County to furnish transportation ___; (b) Employee to furnish and maintain his personal car ___.
☒ Special Conditions or Remarks: ___

Length of residence in Harris County: 6 months Date of Birth: 2 / 24 / 61 Male (1) 3 Female (2) ___ Married (3) 5 Single (4) ___ White (5) 6 Black (6) ___
Education: 3 & 4 (Indicate whether (1) None; (2) Grammar School; (3) High School; (4) College Courses, Incomplete; (5) College Courses Complete (name degree); (6) Post Graduate Work; (7) Business College.)
Previous Employment by Harris County: ___ (Your previous exact name and initials) ___ (Department)
From: / / To: / / (DATES OF PREVIOUS EMPLOYMENT BY HARRIS COUNTY, AND WHETHER PERMANENT OR TEMPORARY)

Payment under this employment for its duration, if temporary, or for the remainder of the year will require $ ___ from Harris County funds as allocated to the budget of this department. I understand and agree that the authority to make the appointment herein applied for, if granted, shall not extend beyond December 31 of the current year unless renewed by the Commissioners' Court and any other approving authority and provided for in the succeeding year's budget. The rules and conditions recited above, the personnel regulations adopted by the Commissioners' Court, and the statutes relative to this position are to govern this employment.

Witness my hand at Houston, Texas this January 12, 19 81
Walter H. Rankin (Signature of Employer)
Constable, Precinct #1 (Title) of Harris County, Texas.

I have read, understand, and accept the terms and conditions of this employment as recited above and in the personnel regulations adopted by the Commissioners' Court. I understand that my employment may be terminated at will by my employer, without notice, without vacation, and without payment for overtime.
I certify that the statistical and personal data shown above are correct.
January 12, 19 81
Ardith S. McPherson (Signature of Employee)

DEPUTATION
(Deputation and Oath of Office are to be filed in duty for those positions for which they are required by law.)

THE STATE OF TEXAS, COUNTY OF HARRIS. I, Walter H. Rankin (Officer), Constable, Precinct #1 (Title)
of the County of Harris and State of Texas, having full confidence in Ardith S. McPherson (Name) of the said County and State, do hereby, with the consent of the Commissioners' Court of said County, Texas, duly entered of record ___, 19 ___, nominate and appoint him, the said Ardith S. McPherson Constable, Precinct #1 (Title) my deputy, in my name, place and stead, to do and perform any and all acts and things pertaining to the office of said Constable, Precinct #1 (Title) of the County and State, hereby ratifying and confirming any and all such acts and things lawfully done in the premises by virtue hereof. Payment of payrolls is to be in accordance with the personnel regulations adopted by the January 12 Court.
Witness my hand at Houston, Texas, this ___, 19 81
Walter H. Rankin (Signature)
Constable, Precinct #1 (Title) of Harris County, Texas.

OATH OF OFFICE
I, Ardith S. McPherson Clerk, do solemnly swear (or affirm), that I will faithfully execute the duties of ___ of Harris County, Texas, and will to the best of my ability preserve, protect and defend the Constitution and laws of the United States ___ of this State; and I, furthermore solemnly swear (or affirm), that I have not directly nor indirectly paid, offered, or promised to pay, contributed, no... ...mised to contribute any money, or valuable thing, or promised any public office or employment, as a reward for the appointment to the above named position. So help me God.
Subscribed and sworn to before me at Houston, Texas, this January 12, 19 81.
Verna Mae (Notary Public in and for Harris County, Texas)
Ardith S. McPherson (Deputy)

CERTIFICATE OF COUNTY AUDITOR
Budget provision has been made, and funds are or will be available to meet claims for payment of compensation lawfully accruing under the above employment not to exceed $ ___ for year, with which I have encumbered Budget Account ___ (Department). Distribution 450, this ___, 19 ___.
Calculated: ___ Personnel Clerk
Posted To Form 1083: ___
Posted: ___ Appropriation Ledger Operator
Appropriation Ledger Posting Checked: ___
___ County Auditor, Harris County, Texas.

NOTE: Payment will not be made of any compensation claimed hereunder prior to the execution of the Auditor's certificate.
INSTRUCTIONS: This form is to be filled in duplicate, executed by the employer and by the employee, and submitted to the Commissioners' Court. By agreement, the County Auditor will check the form and budget and execute his certificate prior to action by the Court or other approving authority. After action by the Court or other approving authority, the County Clerk is to retain the original and refer the copy to the Auditor with the County Clerk's certificates on the reverse side fully executed to show the action of the Commissioners' Court and the reference to the record of the Dep...

COUNTY AUDITOR'S FORM 2418-1-C
HARRIS COUNTY, TEXAS

CHANGE IN STATUS OF EMPLOYEE

[5] [1]

County — COUNTY OR FLOOD CONTROL
2-06 — BUDGET ACCOUNT

Ardith S. McPherson — EMPLOYEE'S NAME

098,56,3359 — SOCIAL SECURITY NO.
03/30/81 — EFFECTIVE DATE (INCLUSIVE)

FOR AUDITOR'S USE ONLY
SHORT TIME FORMULA / FORMULA 2
CAR ALLOWANCE FORMULA /
EMPLOYEE STATUS CHANGE . . .

County Auditor
Commissioners' Court
Gentlemen:

Approval is requested of this application to alter the original contract of employment to the extent of the changes set out below, the original contract to remain in effect in all other respects:

CHANGES FOR PERSONNEL RECORDS OF THE COUNTY AUDITOR:

NATURE OF CHANGE	FROM	TO
Change in Name ** . . . . . ** ATTACH FORM "REQUEST FOR CHANGE IN SOCIAL SECURITY RECORDS"		
Change in Statute Governing this Employment		
[4] Auditor's Remarks		

CHANGES SUBJECT TO THE APPROVAL OF THE COMMISSIONERS' COURT:

[2] Change in Title	Clerk	
Change in Position	NUMBER 0068	NUMBER
	REPLACEMENT OF:	
Temporary Employment Extended	/ /	/ /
Change in Longevity	$	$
[3] Change in Salary	$ 1,208.00 PER month	$ PER
Change in Car Allowance . . . . . (or room and board if specified)		
Change in Required Time	40 HOURS PER WEEK	HOURS PER WEEK
	8 HOURS/DAY 5 DAYS/WEEK 'X' IF AS NEEDED	HOURS/DAY DAYS/WEEK 'X' IF AS NEEDED
Change in Status	(ACTIVE, INDEFINITE LEAVE, TEMPORARY LEAVE)	(ACTIVE, INDEFINITE LEAVE, TEMPORARY LEAVE)
Change in Temporary Leave Expiration Date	/ /	/ /
Transfer (FROM AND TO ACCOUNTS MUST BE UNDER SAME DEPARTMENT HEAD)		

Termination of Employment: Discharged without Seniority

Resigned, Discharged w/o Seniority, Discharged with Notice, Discharged with Severance Pay and Unused Vacation, Temp. Employment exp., Employment exp., Position Abolished, Retired, Medically Retired, Deceased

The requested change(s), if approved, will require the following adjustment of the budget encumbrance made for this employment under Distribution 450: None ____ ; Add $ ____ , Deduct $ ____

The change(s) above set out is/are accepted by me, with the understanding that in all other respects the original contract of employment is to remain in full force and effect.

Very truly yours,

Walter L. Franks
(SIGNATURE OF EMPLOYEE)

(EMPLOYEE)

Constable, Precinct #1
(TITLE) Harris County, Texas

CERTIFICATE OF COUNTY CLERK

This Change in Status was approved by the Commissioners' Court on _____ , 19 ____ , as shown in Volume _____ , Page _____ , of the Minutes of the Commissioners' Court.

_____
COUNTY CLERK, HARRIS COUNTY, TEXAS

(Seal)

By _____ , Deputy

CERTIFICATE OF COUNTY AUDITOR

This Change in Status is accepted. Funds are or will be available to meet claims for payment of compensation lawfully accruing under the contract of employment as hereby amended.

The following adjustment of the encumbrance for this employment against Distribution 450, Budget Account _____ , _____ (Department) in accordance with the terms of this Change in Status has been made: None ____ .

Add $ _____ , Deduct $ _____

Calculated _____ , Personnel Clerk

Posted To Form 1083 _____

Posted _____ , Appropriation Ledger Operator

_____
COUNTY AUDITOR, HARRIS COUNTY, TEXAS

INSTRUCTIONS: This form is to be typed in a duplicate executed by the employer and by the employee (on changes except termination or retirement), one copy to be retained by the department and the original and other copy submitted to the Clerk of the Commissioners' Court if the change is one which requires the approval of the Court, otherwise to the County Auditor. Changes subject also to the approval of the Juvenile Board are to be submitted by the Clerk of the Court to the Juvenile Board.

The Auditor shall examine all changes to check the form and budget and execute his certificate prior to action by the approving authority. After action by the

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-81-1442

ARDITH McPHERSON

v.

CONSTABLE WALTER RANKIN
and HARRIS COUNTY, TEXAS

DEFENSE OF HARRIS COUNTY

MIKE DRISCOLL
County Attorney of
Harris County, Texas

DORI WIND
Assistant County Attorney

DONALD W. JACKSON
Assistant County Attorney

BILLY E. LEE Lead Counsel
Assistant County Attorney
634 Harris County Administration
Bldg.
Houston, TX 77002
(713) 221-5101

ATTORNEYS FOR
DEFENDANT HARRIS
COUNTY, TEXAS

FILED: 25 JUNE 1981

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-81-1442

ARDITH McPHERSON

v.

CONSTABLE WALTER RANKIN
an HARRIS COUNTY, TEXAS

DEFENSE OF HARRIS COUNTY

Comes now Harris County, Texas, named and cited as one of the defendants in the above numbered and entitled cause in which plaintiff is Ardith McPherson. For defense to the charges alleged in her Complaint defendant Harris County would show unto the Court that:

I

Harris County denies that it asserts any control or authority over Constable Walter H. Rankin or his office. Constable Rankin is independently elected by the people who reside in Precinct No. 1 of Harris County, Texas. Constable Rankin manages his office in accordance with the statutes promulgated by the Legislature of the State of Texas to govern the duties and the performance thereof by all Constables in Texas. In the conduct of his office as Constable, Constable Rankin is not carrying out any policy of Harris County, or of Precinct No. 1 of Harris County, but is carrying out State policy of the State of Texas prescribed through its Legislature.

II

Harris County denies that it asserts any control or authority over any deputy or clerk appointed by Constable Rankin to assist him in the performance of his official duties as Constable. In subsection (h) of Section 19 of Article 3912e, Vernon's Texas Civil Statutes, the Legislature of the State of Texas expressly provides "that in no case shall the Commissioners' Court or any member thereof attempt to influence the appointment of any person as deputy, assistant, or clerk in any office." This provision has uniformly been construed as likewise prohibiting any attempt to influence the termination of the employment of any person as deputy, assistant, or clerk in any office. It is expressly denied that Harris County, acting by its Commissioners Court, in any way attempted to influence Constable Rankin in his appointment or termination of employment of Ardith McPherson.

III

No where in her complaint does plaintiff Ardith McPherson allege a single fact against Harris County which would sustain an award of damages against the County or which would warrant injunctive relief against the County. Plaintiff having failed to allege any facts against Harris County for which relief can be granted, Harris County moves for judgment on the pleadings as provided by Rule 12(c), Rules of Civil Procedure.

WHEREFORE, defendant Harris County prays the Court to dismiss this suit for failure to state a claim upon which relief can be granted and moves the Court, pursuant to Rule 12(c), Rules of Civil Procedure, to render

judgment on the pleadings that plaintiff take nothing by her suit of this defendant.

MIKE DRISCOLL
County Attorney of
Harris County, Texas

/s/ DORI WIND
Dori Wind
Assistant County Attorney

/s/ DONALD W. JACKSON
Donald W. Jackson
Assistant County Attorney

/s/ BILLY E. LEE
BILLY E. LEE Lead Counsel
Assistant County Attorney
634 Harris County Administration Bldg.
Houston, TX 77002
(713) 221-5101

ATTORNEYS FOR
DEFENDANT HARRIS
COUNTY, TEXAS

CERTIFICATE OF SERVICE

On this 25th day of June, 1981, I certify that I placed a signed true copy of the foregoing Defense of Harris County in the United States Mail Service with proper postage prepaid, addressed to each counsel of record for plaintiff:

Mr. Stefan Presser
Greater Houston Civil Liberties Union
1236 West Gray
Houston, TX 77019

Ms Annie S. Garcy
1110 Autrey
Houston, TX 77006

Mr. Charles A. Brown
608 Fannin, Suite 1710
Houston, TX 77002

/s/ BILLY E. LEE
Billy E. Lee
Assistant County Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-81-1442

ARDITH McPHERSON,
Plaintiff

v.

WALTER RANKIN, et al.,
Defendants.

(Filed April 15, 1983)

FINAL JUDGMENT

Based upon the findings of fact and conclusions of law entered this date, and pursuant to Fed. R. Civ. P. 58, judgment is hereby entered for Defendant. Plaintiff's claims for relief are in all ways denied.

This is a FINAL JUDGMENT.

Done at Houston, Texas, this 15th day of April, 1983.

/s/ NORMAN W. BLACK
Norman W. Black
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-81-1442

ARDITH McPHERSON,
Plaintiff

v.

WALTER RANKIN, et al.,
Defendants.

(Filed April 15, 1983)

ORDER

This is a suit alleging wrongful termination of employment in violation of Plaintiff's First Amendment rights of free speech. It is agreed that but for Plaintiff's statement on March 30, 1981, Plaintiff would not have been discharged on that date. There being no jury question to be decided, a hearing was held on February 14, 1983, to determine whether Plaintiff's speech was protected. Based upon the pleadings and evidence, the Court now makes the following findings of fact and conclusions of law.

Findings of Fact

1. Plaintiff Ardith McPherson is an adult citizen of the United States of America, and is a resident of Harris County, Texas.

2. Defendant Walter Rankin is the elected Harris County Constable for Precinct One (1). He is sued both individually and in his official capacity as Constable.

Defendant Harris County is a political subdivision of the State of Texas.

3. Defendant Walter Rankin, as elected Constable of Harris County, Texas, is authorized to hire employees subject to approval by said County, through its Commissioners' Court. Tex. Rev. Civ. Stat. Ann. art 6879a § 2 (Vernon 1960).

4. Defendants at all times mentioned herein acted under color of state law.

5. Plaintiff Ardith McPherson was hired by Defendants on January 14, 1981, as a Deputy Constable of Harris County, Texas.

6. As a Harris County Deputy Constable, Plaintiff was required to operate a computer terminal entering and monitoring the progress of summonses issued within Defendant Rankin's precinct.

7. Defendant Walter Rankin employed Plaintiff for a ninety-day probationary period. At the time Plaintiff was terminated, she had two weeks of her probationary period remaining.

8. Plaintiff's application for employment, County Auditor's Form 3405, dated January 12, 1981, read, in part:

> I have read, understand, and accept the terms and conditions of this employment as recited above and in the personnel regulations adopted by the Commissioners' Court. I understand that my employment may be terminated at will by my employer without notice, without vacation, and without payment for overtime.
>
> I certify that the statistical and personal data shown above are correct.
>
> January 12, 1981. (Signed) Ardith S. McPherson

9. The Deputation portion of Form 3405, signed by Constable Rankin the same date read:

> I, Walter H. Rankin, Constable, Precinct #1, of the County of Harris and State of Texas, having full confidence in Ardith S. McPherson of the said County and State, do hereby, with the consent of the Commissioners' Court of Harris County, Texas, duly entered of record _____, 19____ nominate and appoint him, the said Ardith S. McPherson, my true and lawful deputy, in my name, place and stead, to do and perform any and all acts and things pertaining to the office of said Constable, Precinct #1 of the County and State, hereby ratifying and confirming any and all such acts and things lawfully done in the premises by virtue thereof. Payment of payrolls is to be in accordance with the personnel regulations adopted by the Commissioners' Court.
>
> Witness my hand at Houston, Texas, this January 12, 1981.
>
> (signed) Walter H. Rankin
> Constable, Precinct #1

10. Plaintiff's notarized oath of office, also on Form 3405 read:

> I, Ardith S. McPherson, do solemnly swear (or affirm), that I will faithfully execute the duties of Clerk of Harris County, Texas, and will to the best of my ability preserve, protect and defend the Constitution and laws of the United States and of this State; and I, furthermore solemnly swear (or affirm), that I have not directly nor indirectly paid, offered, or promised to pay, contributed, nor promised to contribute any money, or valuable thing, or promised any public office or employment, as a reward

for the appointment to the above named position. So help me God.

Subscribed and sworn to before me at Houston, Texas, this January 12, 1981.

(Signed) Ardith S. McPherson

11. Pursuant to Texas law, all employees of the Constable's office, regardless of job function, are deputy constables and must give the prescribed oath of office. See Vernon's Rev. Civ. Stat. Ann. art. 6879a and 6879b.

12. On March 30, 1981, during the lunch hour, Plaintiff and some other employees heard on an office radio, an announcement of the assassination attempt on President Reagan. Plaintiff concluded a discussion with a coworker about that event and about Reagan administration economic policies with the statement, "I hope if they go for him (President Reagan) again, they get him."

13. The statement was overheard by Captain Levrier, a Deputy Constable, who reported the incident to Constable Rankin. When summoned to Constable Rankin's office, and in the presence of the Constable, Captain Levrier, and Captain Abercia, Plaintiff confirmed that she made the statement in issue.

14. Plaintiff testified that she told Constable Rankin, "Yes, but I didn't mean anything by it." Plaintiff claims her statement did not signify an actual intent on her part to harm or to participate in harming the President.

15. Constable Rankin, Captain Levrier, and Captain Abercia each testified that Plaintiff repeated the statement in the Constable's office. The Constable testified that when he asked her whether she meant it, Plaintiff replied, "I sure do."

16. Constable Rankin instructed his secretary to take Plaintiff off the payroll immediately.

17. When Plaintiff returned the next day seeking an interview with the Constable, he refused to see her.

18. Constable Rankin testified that he lost all confidence in the Plaintiff's ability to be a Deputy Constable and as an employee of a law enforcement agency when she repeated (or acknowledged) her statement. He informed her there was no place for her in that office. He considers it a violation of one's sworn duty to uphold the U. S. Constitution and the laws of the State of Texas to espouse the assassination of any president, judge, or other public official. In his judgment, people would lose confidence in his officers and in him personally, and his credibility as a law enforcement officer would be destroyed if he retained an employee who endorsed such actions.

19. The Court finds that, regardless of the seriousness of Plaintiff's intent, the fact that she did make such a statement while on the job indicated to her superiors that she did not appreciate or possess the sensitivity and discretion required of a public employee. The Constable sincerely and earnestly believes that an individual possessing an attitude such as Plaintiff's is not a suitable employee of a law enforcement agency.

Conclusions of Law

1. This Court has jurisdiction of this case alleging a violation of Constitutional rights under color of state law pursuant to 28 U.S.C. § 1331.

2. A probationary employee such as Plaintiff McPherson may be fired for any reason, or even for no reason—

but not for the exercise of her constitutional rights. *Perry v. Sinderman,* 408 U.S. 593, 597 (1972); *Van Ooteghem v. Gray,* 628 F.2d 488, 490 (5th Cir. 1980), on rehearing *en banc,* 654 F.2d 304 (5th Cir. 1981), *cert. denied,* 455 U.S. 909 (1982); *Garza v. Rodriguez,* 559 F.2d 259, 260 (5th Cir. 1977); *Megill v. Board of Regents of State of Florida,* 541 F.2d 1073, 1077 (5th Cir. 1976).

3. A public employee's private speech, as well as her public statements, may be protected. *Givhan v. Western Line Consolidated School District,* 439 U.S. 410 (1979).

4. While public employment which may be denied altogether may not be subjected to unreasonable conditions, it is clearly established that the State has interests as an employer that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general. *Pickering v. Board of Education,* 391 U.S. 563, 568 (1968).

5. An agency may regulate speech only as far as necessary to accomplish a legitimate government interest: to promote efficiency; to foster loyalty and obedience to superiors; to maintain morale; to instill public confidence in the law enforcement institution. *Gasparinetti v. Kerr,* 568 F.2d 311, 315-16 (3d Cir. 1977), *cert. denied,* 436 U.S. 903 (1978). Also see, *Kannisto v. City and County of San Francisco,* 541 F.2d 841 (9th Cir. 1976); *Muller v. Conlisk,* 429 F.2d 901 (7th Cir. 1970).

6. In certain instances a public employee may be discharged on the basis of speech without offending the First Amendment. *Arnett v. Kennedy,* 416 U.S. 134, 160 (1974).

7. In determining the free speech rights of a public employee, the Court must engage in a three-step analysis:

(a) Is the communication protected;

(b) If so, did it play a substantial part in the decision to fire the plaintiff;

(c) If so, would the employer have fired the employee even if the protected communication had not occurred. *Wilson v. Taylor,* 658 F.2d 1021, 1027 (5th Cir. 1981), citing *Mt. Healthy City School District v. Doyle,* 429 U.S. 274, 287 (1977) and *Pickering, supra; Van Ooteghem, supra* at 491.

8. In the case *sub judice,* the second and third prongs of the test are admitted by Defendant; only step one is in issue.

9. Whether the communication is protected is a question of law to be determined by the Court. *Van Ooteghem, supra,* at 492.

10. To determine whether the communication of a public employee was protected, the Court must balance the interests of the employee, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees. *Pickering, supra,* at 568.

11. Plaintiff has the burden of establishing that her speech was protected. *Mt. Healthy v. Doyle, supra.*

12. In balancing these interests, the Court may consider such factors as the need for maintaining discipline by immediate supervisors, the need for harmony among co-workers, the necessity for personal loyalty and confidence between the employer and employee, the disruption to the workplace caused by the speech, and the

public's need or right to comments and information from public employees on matters of general concern. See *Pickering, supra,* at 570; *Barrett v. Thomas,* 649 F.2d 1193 (5th Cir. 1981), *cert. denied,* 102 S. Ct. 1969 (1982); *Van Ooteghem,* 628 F.2d at 492; *Tanner v. McCall,* 625 F.2d 1183 (5th Cir. 1980).

13. In striking the *Pickering* balance regarding private expression, a Court should consider the content and manner, the time and place of the speech. *Givhan, supra,* at 415, n.4.

14. In the case at bar, Plaintiff's comment did not disrupt the workplace in general. There was no criticism of her immediate superiors. However, the comment clearly undermined her employer's confidence in her as one of his deputies whose public comments and actions during work hours he would be deemed to have ratified. Further, Plaintiff's comment in no way served the public's interest in matters of general concern. While made during the noon hour, the comment was made in the office while at least some employees, including the Plaintiff, were working or as they returned to work from lunch, and loud enough to be overheard by nearby co-workers.

15. The Court concludes that the application of the *Pickering* balancing test shows Plaintiff's speech to be clearly unprotected.

16. Additionally, an employee cannot claim First Amendment protection for speech-related conduct where the ground for discharge was not the speech itself, but because it evidenced character traits undesirable in an employee. *Weisbrod v. Donigan,* 651 F.2d 334, 336 (5th Cir. 1981), *rehearing en banc denied,* 659 F.2d 1079; *Garza v. Rodriguez,* 559 F.2d 259 (5th Cir. 1977), *cert.*

denied, 439 U.S. 877 (1978); *Megill v. Board of Regents of the State of Florida,* 541 F.2d 1073 (5th Cir. 1976). Also see *Phillips v. Adult Prob. Dept., City & Cty of San Francisco,* 491 F.2d 951 (9th Cir. 1974).

17. The Constable's office maintains a strong interest in retaining only those deputies who possess and publicly manifiest qualities of character that accentuate the high standards of the field of law enforcement. See *Megill, supra* at 1085.

18. It was not unreasonable for Constable Rankin to lose confidence in the ability of one who would make such a statement as Plaintiff's, at the time and place it was made, to project a suitable image for law enforcement personnel or to make consistently appropriate law enforcement job decisions.

19. Plaintiff McPherson's First Amendment rights were not violated by her discharge.

Done at Houston, Texas, this 15th day of April, 1983.

/s/ NORMAN W. BLACK
Norman W. Black
United States District Judge

Ardith McPHERSON,
Plaintiff-Appellant,

v.

Walter RANKIN, Individually and In His Official Capacity As Constable, Precinct One of Harris County, TX and Harris County Texas,
Defendants-Appellees.

NO. 83-2399.

United States Court of Appeals,
Fifth Circuit.

July 12, 1984.

Former deputy constable brought suit against constable and county, alleging she was denied her rights secured by First and Fourteenth Amendments when she was fired by constable for a political remark she made to a co-worker during a private conversation. The United States District Court for the Southern District of Texas, Norman W. Black, J., entered summary judgment in favor of constable and county, and former deputy constable appealed. The Court of Appeals, Tate Circuit Judge, held that substantial issues of material fact existed as to "context" in which statement was made, including whether deputy constable admitted to constable that she seriously meant what she said regarding attempted assassination of President and was not speaking in political hyperbole, precluding summary judgment.

Vacated and remanded.

Appeal from the United States District Court for the Southern District of Texas.

Before TATE, JOLLY, and DAVIS, Circuit Judges.

TATE, Circuit Judge:

The plaintiff, Ardith McPherson, a non-tenured deputy constable[1] formerly employed by the defendant Constable of Harris County, Texas, appeals from the grant of summary judgment against her in her 42 U.S.C. § 1983 suit against Constable Walter Rankin and Harris County, Texas. The plaintiff McPherson alleges that she was denied her rights secured by the First and Fourteenth Amendments when she was fired by the Constable for a political remark made to a coworker during a private conversation. Finding that the existence of substantial issues of material fact made summary judgment inappropriate, we vacate the judgment in favor of the defendant Walter Rankin, and remand for a full trial on the merits.

On March 30, 1981, during lunch hour, McPherson and a coworker, after hearing of an assassination attempt on President Reagan, engaged in a brief, private conversation about their opposition to the President's policies on welfare and unemployment. The plaintiff concluded the discussion with the statement: "I hope if they go for him [President Reagan] again, they get him."[2]

---

1. McPherson was employed as a deputy clerk whose primary responsibility was to enter civil papers into a computer. Her duties were limited to clerical jobs. She did not wear a uniform nor was she authorized to carry a weapon or make arrests. She had no contact with the public other than occasionally answering the office telephone.

McPherson was hired for a ninety-day probationary period. At the time she was fired, two weeks of her probationary period remained.

2. The district court's version differs slightly from McPherson's accounting of what exactly was said. McPherson testified at the summary judgment hearing that she said, "[I]f they go for him again, I hope they get him."

A deputy constable overheard this statement and reported it to Constable Rankin who summoned McPherson to his office. McPherson admitted to the Constable that she made the statement. A genuine dispute exists in the factual showing, however, over whether she also admitted that she actually intended the remark as seriously made.[3] Constable Rankin then summarily fired the plaintiff.[4]

McPherson then in June 1981 sued Constable Walter Rankin and Harris County, alleging a violation of her constitutional rights under color of state law. 42 U.S.C. § 1983. Pursuant to Rule 56(a) of the Federal Rules of Civil Procedure, McPherson filed a motion for summary judgment. The defendant Constable Rankin responded and requested a dismissal, claiming that McPherson failed to state a cause of action upon which the court could grant relief. The district court considered the parties' opposing motions as cross-motions for summary judgment, and it ordered an evidentiary hearing, which was held on February 14, 1983, to determine whether the plaintiff's speech was protected under applicable First Amendment principles. Following the hearing, the district court granted summary judgment in favor of the defendant Walter Rankin; McPherson appeals.

[1] In reviewing a district court's grant of summary judgment, we are required to consider the evidence pre-

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3. Of the four persons present in Constable Rankin's office—Constable Rankin, Chief Deputy Abercia, Captain LeVrier, and Ardith McPherson—Rankin and LeVrier claim McPherson said she meant the remark, while Abercia did not recall whether Constable Rankin asked the plaintiff whether she meant what she said. McPherson argues that she pointedly told the Constable, "I didn't mean anything by it."

4. McPherson testified that she returned the following day to try to explain what she meant to the Constable, but was denied an interview.

sented in the light most favorable to the party opposing the motion. *Simon v. United States,* 711 F.2d 740, 743 (5th Cir. 1983). Hence, the factual recitals in the opponent's affidavit as well as hearing testimony of McPherson and her witnesses must be regarded as true for the purposes of this appeal.

[2, 3] If there is a genuine issue of material fact which would cause a dispute to reasonably be resolved in favor of the party resisting the summary judgment, the summary judgment cannot stand. *National Hygienics, Inc. v. Southern Farm Bureau Life Insurance Company,* 707 F.2d 183, 186 (5th Cir. 1983). That the movant appears to the court more likely than not to prevail at trial is no reason to grant summary judgment; it is not the province of the trial court on motion for summary judgment to weigh evidence, assess its probative value or decide factual issues. *Byrd v. Roadway Express, Inc.,* 687 F.2d 85, 87 (5th Cir. 1982). The standard is simply that the evidence shows "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c).

[4] Prior to its ruling granting summary judgment in favor of the defendants, the trial court ordered a hearing so that it could "hear testimony regarding the details of this incident, the intent and motivation of those involved, and the extent to which such speech by one in plaintiff's position affects the ability of the constable's office to perform its services efficiently." In determining whether private speech by a public employee is entitled to First Amendment protection, it is important to consider the context in which it is made, relevant considerations including the "manner, time, and place in which it is de-

livered," and the intention of the speaker. *Bickel v. Burkhart,* 632 F.2d 1251, 1256-57 (5th Cir. 1980).

In this instance, the statement was made by McPherson during the lunch hour in a conversation between McPherson and her boyfriend, a coworker. The conversation took place in a non-public computer room of the constable's workforce; only two other regular coworkers in the room were present at that time, and one of them that testified stated that she did not overhear the conversation when it took place. However, the conversation chanced to be overheard by a deputy constable, who had entered the computer room to pick up papers to take to other precincts. He immediately reported the conversation to the Constable Rankin, the defendant, precipitating the events and McPherson's discharge at issue.

At the evidentiary hearing, Ardith McPherson testified that her statement—"if they go for him again, I hope they get him"—was intended only as a verbal expression of her anger with the Reagan administration's social and economic policies. The plaintiff maintained that "it is just like if I ask my sister to pick me up somewhere and she's late and I say, 'Where is she,' and I said 'Wait till she get[s] here, I'm going to kill her.' That don't mean I'm going to kill her with a gun or knife or weapon. It is an expression of conversation." Hence, the essence of McPherson's contention is that her statement was merely a form of political hyperbole and was not intended to advocate harm to the President.

McPherson also testified that when confronted by Constable Rankin, she assured him that she "didn't mean anything by it," but was not allowed to further explain her comment to him. Constable Rankin testified that

when he asked Ms. McPherson whether she meant what she said, her reply was "I sure do."

[5] The issue of McPherson's intent[5] is relevant to the present inquiry because it is imperative that a court's characterization of speech as political expression, for purposes of First Amendment protection, be predicated upon consideration of its "content, form, and context". *See Connick v. Myers,* ____U.S.____ ____, 103 S. Ct. 1684, 1690, 75 L.Ed.2d 708 (1983), cited with approval in *McBee v. Jim Hogg County, Texas,* 730 F.2d 1009, 1013 (5th Cir. 1984) (factors include employee's motives in voicing the expressions at issue and their context).

[6] Thus, in a § 1983 suit brought by a public employee against his public employer, the "manner, time,

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5. With regard to peripheral issues: In its order of January 10, 1983, the district court stated that it was "convinced that plaintiff's comment in no way constituted a violation of either 18 U.S.C. § 2385 or 18 U.S.C. § 871(a)." Section 2385 provides for federal conviction for one who intentionally advocates the overthrow of the government. To violate section 871(a), one must "intelligently make a statement, either written or oral, in a context and under such circumstances that a reasonable person would forsee that the statement would be interpreted by persons hearing . . . it as a serious expression of intention to inflict bodily harm upon or take the life of the President." *United States v. Rogers,* 488 F.2d 512, 514 n. 3 (5th Cir. 1974), *rev'd on other grounds,* 422 U.S. 35, 95 S. Ct. 2091, 45 L.Ed.2d 1, *on remand* 519 F.2d 1084 (5th Cir. 1975).

It is not necessary to prove an intention to carry out the threat under section 871(a), *id.,* 488 F.2d at 514, but is necessary to prove a "true threat." In *Watts v. United States,* 394 U.S. 705, 708, 89 S. Ct. 1399, 1401, 22 L.Ed.2d 664 (1959), the Supreme Court found that the defendant's statement "if they ever make me carry a rifle the first man I want in my sights is L.B.J." was not a true threat, but a form of political hyperbole. Watts' "only offense . . . was 'a kind of very crude offensive method of stating a political opposition to the President.' " *Id.* at 708, 83 S. Ct. at 1402.

McPherson's intent is, however, significant in the present *civil* case, as a relevant factor in the overall context of the statement.

and place" of a statement, and the "context" in which it is made, as revealed by the whole record, is relevant to the determination of whether the statement is protected under the First Amendment. *Id.* ____U.S. at ____, 103 S. Ct. at 1693.

The context of the speech is especially material when private expression is involved. In *Bickel v. Burkhart,* 632 F.2d 1251, 1257 (5th Cir. 1980), this court noted that when a public employee expresses himself publicly, the primary focus is on the content of his speech; however, where private expression is involved, the balancing test encompasses the manner, time and place in which it is delivered as well as the context in which the statement is made. *See Givhan v. Western Line Consolidated School District,* 439 U.S. 410, 415 n. 4, 99 S. Ct. 693, 696 n. 4, 58 L.Ed.2d 619 (1979).

The court's task is to fully consider each of these factors in applying the *Pickering* (*infra*) balancing test, which compels us "to arrive at a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer in promoting the efficiency of the public services it performs through its employees." *Pickering v. Board of Education,* 391 U.S. 563, 568, 88 S. Ct. 1731, 1734-35, 20 L.Ed.2d 811 (1968).

Based upon the testimony evinced at this hearing, the court issue an order on April 15, 1983, in which it concluded:

> The plaintiff's comment did not disrupt the workplace in general. There was no criticism of her immediate superiors. However, the comment clearly undermined

> her employer's confidence in her as one of his deputies whose public comments and actions during work hours he would be deemed to have ratified. Further, plaintiff's comment in no way served the public's interest in matters of general concern. While made during the noon hour, the comment was made in the office while at least some employees, including the plaintiff, were working or as they returned to work from lunch, and loud enough to be overheard by nearby co-workers.

Offering no further reasons for its determinations,[6] the court concluded that McPherson's speech was unprotected under the *Pickering* balancing test.

[7] As to the intent or motivation of the plaintiff, the trial court merely noted the discrepancy in the testimony regarding McPherson's intention in making the statement. The district court was, of course, unable to make a finding on this issue because of conflicts in the testimony on this material issue. Indeed, it is not the district court's function on a motion for summary judgment to resolve any genuine issue of material fact or make determinations as to the credibility of witnesses, but instead the court must consider the facts presented and resolve all doubts in the light most favorable to the non-moving party. *See Williams v. Shell Oil Company*, 677 F.2d 506, 509 (5th Cir.), *cert. denied*, 459 U.S. 1087, 103 S. Ct. 570, 74 L.Ed.2d 933 (1982).

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6. The court ostensibly engaged in an three-step analysis derived from *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 286, 97 S. Ct. 568, 575, 50 L.Ed.2d 471 (1977):
   1. Is the communication protected?
   2. If so, did it play a substantial part in the decision to fire the plaintiff.
   3. If so, would the employer have fired the employee even if the protected communication had not occurred?

[8, 9] On a motion for summary judgment, the moving party must demonstrate that the facts underlying all relevant legal questions raised by the pleadings or otherwise are not in dispute, or else summary judgment should be denied. Fed. R. Civ. P. 56(c). As noted above, we perceive that substantial issues of material fact existed as to the "context" in which the statement was made,[7] including whether McPherson admitted to the Constable that she seriously meant what she said rather than spoke in political hyperbole.[8]

The issues presented in this case would more properly be resolved after a trial on the merits because we find the existence of substantial issues of material fact. We, therefore, VACATE the district court's summary judgment and REMAND for a full trial on the merits.

VACATED AND REMANDED.

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7. The court further held that McPherson's discharge was justified because her "speech-related conduct . . . evidenced character traits undesirable in an employee." If the plaintiff's speech was unprotected, then, under the terms of her contract as a non-tenured employee, she was terminable at will without notice by her employer. The justification for the discharge thus enunicated is necessary only if she was discharged for the exercise of protected speech.

Should, on remand after a full factual hearing, the district court determine that the plaintiff's speech was indeed protected, the court will then have to apply the remaining factors of the test expressed in *Mt. Healthy, see* note 8, *supra*. For instance, when an employee is fired, not for the content of what he has said, but for undesirable character traits evidenced by the speech, he may have no claim to First Amendment protection from the discharge. *See Garza v. Rodriguez,* 559 F.2d 259, 260 (5th Cir. 1977), *cert. denied,* 439 U.S. 877, 99 S. Ct. 215, 58 L.Ed.2d 191 (1978) (drunken, belligerent behavior accompanied by abusively foul language); *Megill v. Board of Regents of State of Florida,* 541 F.2d 1073, 1085 (5th Cir. 1976) (false and misleading public statements, profanity, disruption of public meetings).

8. Relevant to McPherson's due process claim implicated by her complaint, is the Constable's refusal, both on the day of the incident and the following day, to allow McPherson to explain herself.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-81-1442

Houston, Texas, January 21, 1985

ARDITH McPHERSON,
Plaintiff,

vs.

WALTER RANKIN, Individually and in his official capacity as Constable, Precinct One (1), of Harris County, Texas; and Harris County, Texas,
Defendants.

TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE NORMAN W. BLACK

APPEARANCES:

For The Plaintiff:
Ms. Annie S. Garcy
Mr. Bruce Griffiths

For The Defendants:
Mr. Billy E. Lee
Mr. John Mahoney

Court Reporter:
June Simon

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* * *

[9]

Constable Walter Rankin.

The Court: All right. Constable Rankin.

Mr. Griffiths: Your Honor, at this time the Plaintiff would invoke the rule.

The Court: All right. Are there any persons in the courtroom who may testify in the case, other than the Plaintiff herself?

Mr. Griffiths: We have two witnesses here, Your Honor. I believe there are two witnesses.

The Court: All right. Let's stand, if you will, please, and be sworn.

(All witnesses present in courtroom duly sworn.)

The Court: Would you all please wait in the hall until you are called to testify, and not discuss your testimony with each other or anyone else except the attorneys in the case.

Walter H. Rankin, Plaintiff's witness, sworn

DIRECT EXAMINATION

By Mr. Griffiths:

Q. Constable Rankin, would you state your name for the record, please.

A. Walter H. Rankin.

Q. And you are, sir, the elected Constable of Precinct 1 of Harris County, Texas? Is that correct?

A. Yes, sir.

[10]

Q. Precinct 1 of Harris County, Texas is a district which encompasses part of but not all of the county; is that right?

A. That is correct.

Q. And is it true that that precinct is wholly within the city limits of the City of Houston?

A. Well, we have had new boundaries changed within —I'm not exactly sure of that. Most of it is.

Q. Okay. And back in 1981 when the facts surrounding this lawsuit occurred, was it in the same situation, as all or mostly within the city limits of Houston?

A. No. There's other parts of some other cities that it covers, and it could be some more in the county. I'm not sure just exactly it's all, but the majority of it is inside the city limits of Houston.

Q. Okay. It is, in fact, the Constable's precinct which encompasses downtown Houston, for example?

A. Yes, sir.

Q. And moves out from there, generally speaking?

A. Yes, sir.

Q. How many precincts are there within Harris County, Texas? Constable precincts?

A. Eight.

Q. Do you have any idea what the population of Precinct 1 is?

A. Probably 350,000.

[11]

Q. And most—is there any part of it which is totally unincorporated? That is, has no city having jurisdiction over it?

A. I don't recall.

Q. But it's true, is it not, that substantially all of your precinct has other law enforcement departments who are charged with the day-to-day enforcement of the criminal laws in that area? Is that right?

A. Yes. We all do.

Q. All right. And, in fact,—okay. Let me back up. As the elected constable, you are elected by popular vote, the citizens of the precinct; is that correct?

A. Yes, sir.

Q. And you are elected on a partisan ballot every how many years?

A. Every four years.

Q. And you were elected, were you not, as a democrat?

A. Yes, sir.

Q. And what is the number of employees that were in your employ as Constable of Precinct 1 back in the spring of 1981?

A. I believe it was 82 or 83.

Q. And I take it that as an elected public official, you are the person with full responsibility for the operation of the Constable's office of Precinct 1?

[12]

A. Yes.

Q. And the only authority that anybody—any other officials have over you is that the county attorney's—I mean the County Commissioner's Court gives you money, passes—levies taxes and makes appropriations to your department; is that right?

A. They give me money for my salary. They appropriate money for my budget.

Q. And are there any other sources of income for your

department? In other words, do you collect any of the fees for services?

A. All of the money collected goes into the general funds.

Q. Okay. But your salary is—when you say they give you your salary, they are required to by law, to pay you the salary that is set?

A. Yes.

Q. And for other employees of the department other than yourself, the County Commissioner's Court does have some control over how many there are, because they are the ones who appropriate money to pay you?

A. Set their salaries and appropriate the money for the employees for that department.

Q. Okay. Would you say that you are, in essence, the policy making official for the Precinct 1 Constable's office?

A. Well, I make the policy. I guess you would say I see that

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the laws are enforced and the duties are carried out.

Q. You don't answer to any other county officials as your supervisor?

A. Well, I answer to the Commissioner's Court for deals. I answer to the auditor's office to be sure that all fees are collected. And I think that everyone answers to someone. I certainly answer to the public.

Q. All right. That certainly wasn't a well-phrased question. But in the hierarchical sense, there is nobody in a chain of command that is above you? That is your superior officer?

A. Well, I would say that the Commissioner's Court would be in the point because if I did not carry out my

function, certainly they could reduce staff, they could reduce—they would have lots of control.

Q. Fundamentally whether or not you hold your office is dependent on the will of the people of Precinct 1; is that correct?

A. That is correct.

Q. And you may—you have a relationship with the commissioners in the same sense that, for example, the governor has a relationship to the legislature, or the President has a relationship with Congress, that they have some powers that you don't have, and you have some powers that they don't have; is that right?

[14]

A. I have a relationship with all peoples of Harris County and the state.

Q. Commissioner's Court can't fire anybody for not—in your department because they don't think they are doing their job; right?

A. Well, they may not fire them, but they could eliminate the position.

Q. They could eliminate a position, but you could decide who filled that position; is that right?

A. Well, if a certain position would be—if they came in and eliminated that certain position there, then that position would be gone.

Q. And the person who held that position, you could hire the next day for another position; is that right?

A. Yes, if I had the position.

Q. Right. Or if you wanted to fire somebody else to put them in that position because you thought the person whose position was eliminated would do a better job than somebody else that was on the staff in the position that hadn't been eliminated.

A. Well, you are getting in a very technical—I don't have a desire to fire anybody; to have someone else because they are—

Q. My point is that you make the personnel decisions. They tell you—

[15]

A. Yes.

Q. —You can have X number of positions in your department, and you are the one that determines how they are filled; is that correct?

A. Yes. They are to please me and carry out the functions, the guidelines. But we run the office.

Q. And you were the one—you were the person who made the decision to dismiss Ardith McPherson; is that correct?

A. Yes.

Q. And it was not a matter of the County Commissioner's Court eliminated her position, it was a matter of you decided that she would no longer serve in that position.

A. I was the one that lost confidence in her.

Q. The functions of the Precinct 1's Constable Office as it exists in Harris County, or as it existed in 1981—one of the major functions of that office was to serve civil papers that are generated by the various courts of Harris County; is that correct?

A. That carries a lot to do with it, yes.

Q. And, in fact, your office is sort of the central distribution mechanism for civil papers in Harris County. That is, if I file a lawsuit, the papers will go to your office, even if they are to be served in somebody else's precinct; is that correct?

A. Yes, sir.

[16]

Q. And somebody in your office has the job of finding out which precinct they are to be served in, and making sure they get to that precinct?

A. Yes, sir.

Q. About what percentage of your—well, back up. Your office also has the function of serving papers for the juvenile courts of Harris County; is that right?

A. Yes, sir.

Q. And one of the things that juvenile courts handle in this Harris County system is juvenile delinquency cases; is that right?

A. That's correct.

Q. So you go out and serve papers on juveniles who are accused of delinquency, or your people do?

A. Whatever the courts—whatever the court order is. We carry out the order of the court.

Q. Okay. And occasionally you arrest juveniles for violation of criminal laws, who are too young to be prosecuted as adults; is that correct?

A. If the court does allege that we bring them before them, we bring them before the court.

Q. Another function of your office is to execute what are called mental health warrants; is that right?

A. That's correct.

Q. And that is essentially when a court of competent

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jurisdiction—which would be the probate courts in Harris County—determine that a person is a danger to himself or others because of mental disease, and go through the appropriate procedure, they issue a warrant that authorizes you to go out and arrest this person to be held in a mental health facility?

A. We don't class it arrest them, we class it as being in custody and carrying it to the psychopathic ward, to hold them until they have the hearing. But we don't class it as being arrested.

Q. What percentage of your budget would you say is devoted to carrying out those three functions that I have just described? That is, the civil paper service, the juvenile court service, and the mental health warrants?

A. A great percentage.

Q. More than 80 percent, would you say?

A. Yes.

Q. Your department does not have officers assigned to patrol cars to patrol the streets of your precinct, do they?

A. No, sir.

Q. One of your statutory duties is to serve essentially as the bailiff and the arm—wing of the justice of the peace courts for your precinct; is that right?

A. Yes, sir.

Q. And so you essentially do anything that requires a law

[18]

officer, in connection with the operation of those courts; is that right?

A. We carry out any function in law enforcement that I deem necessary or would be an aid to help to the citizens of Harris County.

Q. Okay. But I'm not asking what you have the power to do. I'm asking what in fact you did do back in 1981. And while you may have had the power to put people out in patrol cars, you deemed it unnecessary to put deputies out in patrol cars.

A. We were not doing it.

Q. And that's because you decided not to do it?

A. That's right.

Q. Some other constables in this county in fact at that time were putting deputies out in patrol cars.

A. Yes.

Q. So the function in connection with the justice of the peace court, the justices of the peace courts have both civil and criminal jurisdiction; is that right?

A. Yes, sir.

Q. Their criminal jurisdiction, however, is limited to crimes for which no jail sentence may be assessed. Is that an accurate assessment?

A. I'm not going to go on the—what the courts do. We carry out the orders of the court, regardless of what it is.

[19]

Q. How long have you been a constable in Precinct 1?

A. Since January 1st of 1965.

Q. Okay. Almost—well, 20 years now; is that right?

A. Yes, sir.

Q. And it's true, isn't it, that in your experience, justice of the peace courts in Precinct 1 only handle criminal cases that are classified as Class C misdemeanors; is that right?

A. Yes, sir.

Q. And Class C misdemeanors are crimes under the Texas Penal Code which have as a maximum penalty a $200 fine; is that correct?

A. Yes, sir.

Q. And, in fact, within the City of Houston, there is a system of municipal courts; is that right?

A. Yes, sir.

Q. And the system of municipal courts also has jurisdiction over—concurrent jurisdiction with justice of the

peace court, Precinct 1, to hear crimes involving Class C misdemeanors or other offenses which have a penalty of no more than $200 fine?

A. I'm not involved in the court system between the J.P. courts and the municipal court. Mine is carrying out the orders of the court, and I work with them, as I do with the district judges and district attorney's office, on all crimes.

[20]

Q. How long did you work with the Houston Police Department?

A. Eighteen and a half years.

Q. And when you were working with the Houston Police Department, was there a system of municipal courts in existence? City of Houston Municipal Courts?

A. Repeat?

Q. Was there, during the time that you worked with the City of Houston Police Department, a system of municipal courts in place for the City of Houston?

A. Yes, sir.

Q. And when Houston Police officers during that time arrested somebody for a violation of an ordinance or a Class C misdemeanor, that case was filed in the City of Houston Municipal Court, was it not?

A. Yes, sir.

Q. And as far as you know, that situation hasn't changed, has it?

A. No, sir.

Q. Okay. So if a Houston police officer arrests somebody for a Class C misdemeanor, he will, as a matter of department policy, file his case with the Municipal Court of the City of Houston; is that right?

A. I presume so.

Q. And you have already testified that your precinct is primarily within the city limits of the City of Houston;

[21]

is that right?

A. With other cities.

Q. Okay. What other cities?

A. Part of Bellaire and part of West University, and—

Q. Southside Place?

A. Yes, sir.

Q. Okay. West University has a municipal court, does it not?

A. Yes, sir.

Q. And police officers employed by the City of West University Place file their Class C misdemeanor cases in municipal court, do they not?

A. Yes, sir.

Q. Your answer?

A. Yes, sir.

Q. And that is also true of Bellaire and Southside Place, is it not?

A. Yes, sir.

Q. So the effect of that is that most of the criminal cases within Precinct 1 of Harris County which might fall within the jurisdiction of the justice of the peace courts are in fact filed by other police agencies and municipal courts within that district; is that right?

A. You mean the other cities?

Q. I'm saying Houston and the other cities, when they arrest

[22]

somebody, they file their cases in municipal court.

A. I presume they do. I have never really been interested where they were filing them. That was their responsibility.

Q. Okay. But the effect of that is that the case load of the justice of the peace's—justices of the peace for Precinct 1 are primarily civil; is that not true?

A. No.

Q. Why not?

A. Well, because they take criminal cases on warrants or different things that are filed in those courts.

Q. Okay. Bad checks are in fact the primary criminal prosecutions that take place in those courts, are they not?

A. Well, we have lots of them coming through there.

Q. The majority—the vast majority of criminal cases in justice of the peace courts are in fact bad check cases in Precinct 1?

A. I am not going to testify, counselor, what their case loads are on the different ones, because I have no way of knowing.

Q. Twenty years as constable, and you can't even make a generalization to the effect of what most of their criminal case work is?

A. I am not going to speak for the courts. I'm telling you I do not check their record. I have no right to go into their office and check their record. I am interested in the

[23]

records and the function that I have, that goes through my office.

Q. Okay. Well, let's talk about what you do, then. You understand when I talk about the difference between a civil case and a criminal case? You understand the distinction I'm making, do you not?

A. Yes, I do.

Q. Okay. And civil papers—juvenile courts and mental health warrants all fall in the category of civil papers, do they not, under Texas law?

A. Repeat it all over again.

Q. Civil summonses and civil process, mental health warrants, and juvenile proceedings are all considered civil proceedings under Texas law?

A. Some juvenile proceedings that we have, ones that we pick up may be criminal, but the others, yes, the majority of them are civil.

Q. And, in fact, even when you arrest a juvenile as a juvenile deliquent, or taken pursuant to a writ issued by the juvenile court, that is technically denominated a civil proceeding, is it not? Or a juvenile delinquency proceeding?

A. I would have to look at the court order to read what the court said, whether it's to be classed as that.

Q. What percentage of criminal papers or criminal activity—

[24]

strike that.

What percentage of your deputies' activities are involved in arresting people on or doing anything with writs that have come out of criminal courts? I mean adult criminal courts?

A. Well, regardless of whatever the papers that we might get from the district attorney's office to assist them from other sheriff's departments and our sheriff's departments, or constable's office in this county or other constable's offices in other counties, on arrest warrants, or whatever help that they might be asking for that we provide this.

Q. Okay. What percentage of your office's activities are involved in serving criminal—executing the criminal warrants, or serving criminal court's subpoenas, or doing any of that?

A. Most of our percentage is with civil papers and hot check warrants.

Q. Now, I believe that you previously testified that on occasion, your office has been assigned to guard visiting dignitaries who visit Houston.

A. We have been requested many, many times to assist, and we do.

Q. Is that something which, when you—let me ask you this: When you assign a deputy to work that kind of assignment, is that a regular assignment that he is required to perform, or

[25]

is that like an off-duty job that he has the option of accepting or rejecting?

A. We can have either way we want to do it. We assign them because working with the other agencies of the seriousness of the protection.

Q. So is your answer that sometimes it's an off-duty job, and sometimes it's a regular assignment?

A. If it falls through the hours there that the man is on duty, we use them anyway, or furnish people for protection of anyone when the time might call upon it. I'm not going to worry about civil papers or something if somebody needs protection, I'm going to assign the personnel that I am comfortable with.

Q. Okay. Have you ever had occasion to supply deputies for dignitary protection where they were taking it as an outside job, and somebody else was paying them other than Constable Rankin's office?

A. I would not allow my personnel that furnishes security for anyone to come in here if they was on duty, to accept money from anybody.

Q. Well, suppose it was at a time period when they weren't on duty. In other words, I presume that since you don't do street patrol and you don't have a jail of your own that you man—is that correct?

A. The only time they would ever accept money for a deal,

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if it would be for a private party, but for certainly not protecting the property or people that are coming into this city that we are requested to assist the Houston Police Department, Department of Public Safety, or—no way do they ever accept money.

Q. Okay. And that is on whatever shift they are working, they work to guard that person?

A. Well, I can use them any shift that I want to, counsel. My hands are not tied. That is a position that I will have to take, because our officers and myself, we are not clock watchers. We go when the time is needed, we use the personnel when it's needed. And I would hate to know that I was furnishing security where someone needed help, and it's time for them to get off, and I would say, hey, we can't furnish you anymore. So we are not clock watchers. We are not going to worry about whether a man—as long as my duties are kept up and we can assist other people in other departments, we will do that.

Q. When you assigned a dignitary—back up. One more thing. There is no portion of your precinct that doesn't have some other agency that is responsible for day-to-day law enforcement within its area, is there?

A. All law enforcement agencies work together, coun-

selor. We don't look at boundary lines when it comes to protection of citizens.

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Q. I'm not talking about guarding dignitaries. I'm saying if we say that day-to-day law enforcement involves having policemen out in patrols looking for crime taking place and responding to emergency calls and so forth, you don't do that at present, and you didn't do that in 1981, did you?

A. No.

Q. Okay. And there is no portion of your precinct where there isn't another agency that in fact does that work, has people on patrol looking for crime, responding to emergency calls?

A. Well, Counselor, if I wanted to put automobiles on the street and put marking, and start patrolling the city of Houston, there is nothing to keep me from it.

Q. I understand that.

A. I just don't do it.

Q. You don't do that because the sheriff is patrolling the unincorporated areas of the county, and the various municipal police departments are patrolling within their city limits; it that correct?

A. And other constables.

Q. Yes, sir. Okay. The people who work for you, I believe you testified in the prior proceeding, are all deputy constables. That is their title; is that correct?

A. Yes, sir.

Q. And here in the State of Texas, we have a statewide

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procedure for commissioning peace officers; is that not also correct?

A. Yes, sir.

Q. And for someone to be a certified peace officer within the State of Texas, it is required that he undergo a certain amount of background check; is that right?

A. That is the law.

Q. It's also required, I believe, that he have some psychological exam; is that right?

A. Yes, sir.

Q. It's required that we have a course of study in law enforcement; is that correct?

A. Yes, sir.

Q. How many hours is that?

A. Well, since I serve on the commission of law enforcement standard education for the State of Texas—I have served six years, and I have just been appointed again to serve six more years—we are always—right now it's 320 hours, but I have just made the motion the last commission that we raise it up to 400 hours.

Q. So it's a substantial amount of training?

A. Yes, sir.

Q. And you think—your suggestion is that they need a little bit more?

A. I don't think that any of us has enough training.

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Q. Very good. And in order to—let me ask you this: it's against the law in Texas, except under certain circumstances, for somebody to walk around with a handgun on their person; is that right?

A. Yes, sir.

Q. That doesn't apply to commissioned peace officers, does it?

A. No, sir.

Q. In fact, that is one of the things that a commission entitles you to do, is to walk around with a side arm?

A. Well, the commission doesn't do it. The law provides officers to be on duty 24 hours a day, if necessary.

Q. But if you don't have a commission, you are not a peace officer under the law?

A. May not be a peace officer, but you would be a deputy. Like in my office, the clerks and everyone else are still deputies, which I can design certain functions or work that they can do in my name. They—well, just take for granted just started out, took the oath for the next four years. After every four years, we all regive the oath of office again, which I just got through on January 2nd. Everyone takes the same oath of office because of the nature of the work, the function that we do.

Q. And a deputy who is not a commissioned peace officer would not be sent out armed to enforce the laws of the

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State of Texas on the streets, would he?

A. No, sir.

Q. And he certainly would not be sent out to guard the President of the United States or any other visiting dignitary, would he?

A. No, sir.

Q. Now, do you have any idea how many civil papers come into your office to be either served or distributed to somebody else to be served every year?

A. I don't have the figures with me. Probably 200,000 or more.

Q. Very many papers?

A. Yes, sir.

Q. Okay. And Harris County being a large metro-

politan area, it's no longer possible to serve civil papers by sticking them in cubbyholes and hoping that the deputy will pick them up and carry them out and be served. This is an automated office that you operate; is that correct?

A. Very much so.

Q. And you have—do you have your own computer system, or do you have access to the county?

A. County.

Q. And the computer system is supposed to keep a record of wherever any paper that has been issued by every court in Harris County is at any given time?

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A. Yes, sir.

Q. So that if I'm an attorney here in town and I have Mary Ellen's divorce filed, and I want to know why papers haven't been served on her husband yet, I can call your office and somebody will answer the phone, punch the name up on a computer, and tell me where the papers are; is that right?

A. Five to six seconds, we can give you the information you need counselor.

Q. How many people do you have or did you have working in early 1981 whose job was essentially to type data into that computer system?

A. Possibly about—at that time probably 16, 17. I don't recall just exactly. The staff has grown since then.

Q. And their job was to take these civil papers, look at the names of the parties, look at the cause number, look at what court it was out of, address, lawyer, all this important data, and type that into the memory of the county computer; is that—

A. If that is the assignment I put them on, that would be it. Whatever assignment I give them, that's what their assignment is.

Q. Those people who carried guns while they were typing, they didn't carry them to use them, did they?

A. No, sir.

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Q. And, in fact, those jobs are not jobs that you require somebody to be a commissioned peace officer to fill?

A. No, sir.

Q. There are some jobs that you would require somebody to be a commissioned peace officer before they could be assigned to it; is that right?

A. Yes, sir.

Q. What jobs are those?

A. Serving civil papers, serving warrants, serving the mental warrants, carrying out writs of all types of the court, execution, and so on and so forth.

Q. And so essentially, anything where you are going to leave that office and go out and present yourself as the representative of the governmental power of the State of Texas, you are going to have to be a commissioned peace officer?

A. Just like every other peace officer in the state, yes, sir.

Q. Exactly.

The Court: Mr. Griffiths, I hate to interrupt you, but I am going to have to step out for a few minutes and select a jury in another case. We are going to do it across the hall so you all can stay in your place.

Constable Rankin, if you would like to step down and just take it easy for a few minutes, this shouldn't

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take more than 20 minutes or so.

(Jury selected in other case.)

The Court: Okay. Be seated, please. The jury is selected in the other case. We are ready to go back to work here.

Mr. Griffiths: May I proceed, Your Honor?

The Court: Yes, sir.

By Mr. Griffiths:

Q. Mr. Rankin, I believe you testified earlier that you are elected on a party ticket; is that correct?

A. Yes, sir.

Q. So you have, for the 20 years that you have been constable of Precinct 1, been selected as a Democrat; is that correct?

A. That's correct, sir.

Q. Would you consider that your office essentially is a partisan political office?

A. Counselor, in the work I do, I don't care whether a man is Democrat, Republican or an Independent. It's just that we don't look at that. We carry out the enforcement of the laws, and I don't think law enforcement has a party.

Q. Okay. And political opinion is not a prerequisite to getting a job in your office?

A. I have Democrats working for me, I have Republicans working for me. I don't ask them which party they belong to.

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Q. So someone with—who was either for or against

the Reagan Administration could still work in your office, notwithstanding their opinion on that subject?

A. I don't ask them how they vote or who they vote for, Counselor.

Q. The people who work for you are all deputy constables, but the jobs that they do are different jobs. I think we have already talked about that. First of all, what do you call, in terms of job description, the job of taking data off the court papers and putting them into the computer system?

A. I call them deputies assigned to clerical positions.

Q. And when you hire somebody for a job, clerical position, it's true, is it not, that you do not require them to be a commissioned law enforcement officer?

A. No, sir. But if they so request later on, want to go to school, then I'll assist them in training, which I have done in the past, which I am doing now.

Q. Okay. But that is not a prerequisite to employment in one of these clerical jobs?

A. No, sir.

Q. And, in fact, when Ardith McPherson applied for a job in your office, she was not required to undergo the psychological testing, for example, that a peace officer is required to undergo before he gets commissioned as a peace

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officer?

A. No, sir.

Q. And she wasn't required to submit to a polygraph test, was she?

A. No, sir.

Q. And she wasn't required to take 300-odd hours of training as a law enforcement officer?

A. No, sir.

Q. And I presume that you did not require her to do those things because you didn't think that that was necessary for her to perform her job.

A. Well, she wasn't there long enough for me to evaluate her on doing any job. She had only been there a short time, and—

Q. My question is, you made the determination that people who were hired to do the job that Ardith McPherson was hired to do, would not be required to undergo the screening or training that a peace officer would be required to undergo.

A. No unless she proved her desire, or wanted to go further up into law enforcement. Then she would have.

Q. So the decision of a deputy constable who is not a peace officer, to become a peace officer, is a voluntary one on that deputy's part?

A. Well, I'm not going to force someone to get in law enforcement if they don't have a desire, sir.

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Q. And it's not a condition for keeping the job as a deputy constable?

A. Not unless they enforce the laws on the street. Not for—some particular assignment.

Q. Okay. The area—I take it you are familiar with the physical area of your office in which Ardith McPherson was working on March 30, 1981.

A. Yes, sir.

Q. You know where that was in your office?

A. Yes, sir.

Q. Could you describe that for me real briefly.

A. Just a large office with lots of CRT terminals for

about—I guess I had about ten or 12 people working in that particular area.

Q. Okay. Is that an area to which the general public has uninvited access, or unlimited access?

A. Well, they can go in. I don't close any part of my office off to anyone. I have tried to keep as much traffic off as possible in there, but as far as saying, no, they don't go in there, I don't have a restricted area.

Q. Okay. So that is not a reception area of your office?

A. No.

Q. And jobs of the women or the people who were working in that office was not to deal directly with the public as it presented itself to the people?

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A. Well, they do deal directly with the public. When an attorney would come in to where there are questions on service or something, then they are carried back there where the supervisor there would go and look through, and so, no. They can come on in and work, and get whatever information they need.

Q. Okay. Well, let's clarify this. Back in March of '81, if an attorney came into your office, where was that office located at that time?

A. At that time, it was 300. Our suite number was 300. But I have moved since then. I have larger space.

Q. I understand that, but at that time, you were on the third floor of the Harris County Criminal Courts Building; is that correct?

A. Yes, sir. I still am.

Q. And if an attorney walked into your office there would be somebody there whose task was to ask him what his business was, or if anybody came in, to ask him what his business was; is that right?

A. We have a reception area there to assist anyone, yes.

Q. Right. And that is not the same area where these people—where Ardith and the other employees were entering data into the computer system?

A. No, but these are people that would carry them back there if they desired to go.

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Q. The position—directing your attention specifically to March 30, 1981, how did you first become aware that Ardith McPherson—back up. One more question.

The area where they were, was it at that time permissible for the employees to listen to a radio?

A. I don't mind them listening to radios as long as it's reasonable.

Q. Okay. So there was a radio in that office, and that was with your knowledge and—

A. Yes, sir.

Q. —your permission?

Would it be fair to say that the job of typing the data into the computer system terminal is a fairly repetitious kind of job? You are typing a lot of—doing the same task over and over again, essentially?

A. Yes, sir.

Q. And you decided, as an employer, that it was reasonable to allow a little bit of distraction with the radio on?

A. Well, if it got too loud, then it would be turned off, but if it was on their lunch hour or something, or if it was reasonable, I wasn't going to be that hard to get along with.

Q. Okay. Directing your attention to March 30, '81,

how did you first become aware that Ardith McPherson had made some remark about President Reagan?

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A. When Captain Pat Riley, who worked for me, who has now passed away, and Captain Levrier had walked out and went to Captain Riley, and brought him into my office and told me about it.

Q. Okay. Who came in to your office? Riley and Levrier, or just Riley?

A. Riley.

Q. Okay. And what did Riley tell you?

A. He told me that Captain Levrier was very upset because of a remark that Ms. McPherson had made, and he repeated it to me. I said, get Captain Levrier and bring him to my office.

Q. What did he tell you the remark was?

A. That Ms. McPherson had stated that today they shot the President, and hoped the next time they tried it, they would get him.

Q. Okay. And you understood that Mr. Riley—Pat Riley—had not heard that remark?

A. I knew that he hadn't.

Q. Okay. So from the very beginning, you understood that this remark was, at this point, third-hand, when it got to you; is that right?

A. He had stated to me that it was from Captain Levrier, and that's the reason I called Captain Levrier into my office, so that it would not be third-hand.

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Q. Okay. What did Captain Levrier tell you?

A. He came in and told me just exactly what I had

stated to you, that she had made the remark, and he asked her if she meant it, and that she said yes, and so I—

Q. How did he characterize the remark? How did he describe it?

A. Exactly the way that I stated to you. That she hoped that the next time they tried it, that they would get him.

Q. Did either of you—did either of those gentlemen tell you anything else about the conversation during which this remark had taken place? Did they tell you, for example—

A. They told me of the remark that was made. I was very concerned that this remark was made, and that's when I sent for—

Q. Okay. We will get to that. But my question is, what did they tell you about the remark, or about the conversation, other than quoting that exact remark that you say both of them quoted the same way?

A. The very remark was that she had stated that the President had been shot, and that she hoped that the next time, that they would get him.

Q. Okay. Now—

The Court: And Captain Levrier told you he asked her—

The Witness: Yes, sir.

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The Court: —if she meant it.

The Witness: If she meant it.

The Court: And she said—

The Witness: Yes, I do.

The Court: All right.

By Mr. Griffiths:

Q. Okay. Now, did they say anything about how that remark happened to be passed? Did they tell you whether or not she was standing on her chair, declaiming to the office, or did they tell you where she said it, to whom she said it, or any other details other than what you have already quoted?

A. Counsel, I did not go into that, because then it was my concern, it was my decision, and I wanted to talk to Ms. McPherson myself, and that is when I brought her in to my office.

Q. Okay. You brought her in to your office. And who was in your office when she came in?

A. Captain John Levrier and Jack Abercia.

Q. Okay. Now—and is—Abercia is also a captain?

A. No. He is my chief.

Q. Okay. And both of those men are deputy constables; is that correct?

A. Yes, sir.

Q. And where was Riley at this point?

A. He was out in the reception area, where his job is

carried on.

Q. And what conversation took place at the time that Ms. McPherson, Chief Abercia and Captain Levrier were in your office?

A. The question I asked Ms. McPherson is that, I have a report here of a remark that you have made, that it greatly concerns me, and did you say what—the thing. And she said yes. I said, do you mean it? She said, yes, I meant it.

Q. Back up. As best you can remember, what was the question you asked her, exactly, about the remark?

A. It was if she made the remark about hoping that the President, the next time he was shot, that they would get him. And I said, do you mean that. And no doubt in my mind, she said, yes. And that is when I took my action.

There was not any doubt in my mind, but I wanted to know myself, not what other people told me. And she cleared up my point for me.

Q. Your action—did you ever ask Ms. McPherson to whom she had made that remark?

A. I did not.

Q. Did you ever ask Captain Abercia—or Chief Abercia to whom she had made the remark?

A. I was not concrned who she had made it to, because she had made it to me, and when she made the remark to me, then

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I lost all confidence at all that I could ever be comfortable in a law enforcement office and agency that I could permit her to be—

Q. Did you ever ask Mr. Levrier to whom she made the remark?

A. I did not go into it, what Mr. Levrier had told me.

Q. Did you ever ask—

A. I based my fact on what was made to me direct.

Q. Did you ever ask Lawrence Jackson to whom she had made the remark, before you determined to fire her?

A. I didn't discuss anything with Lawrence Jackson.

Q. Did you ask Lawrence Jackson about what the conversation was during which that remark had been made?

A. No.

Q. You wern't interested, right?

A. I was interested in the remark was made to me direct. After she satisfied my mind, face to face, that she meant what she said, then I did not go any further with it.

Q. Okay. And you also are aware that on the 31st of March, 1981, Ms. McPherson came by your office and requested an interview with you; is that correct?

A. Yes, and it was denied.

Q. So it wasn't inadvertent? You consciously refused to talk to her anymore about the subject?

A. I didn't have any other discussion that I needed to take

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up with Ms. McPherson. It was my opinion that she was sincere what she was doing, and I didn't have anything else to discuss with her.

Q. And the fact—you, after this investigation in the matter—you called the Treasury Department, did you not?

A. I called the Secret Service and everything.

Q. And reported to them that you had a—

A. The remarks.

Q. —a person they ought to investigate; is that right?

A. Yes, sir.

Q. Did you ever ask Ms. McPherson whether she was working or on her lunch hour during this conversation?

A. No, I did not ask her.

Q. As far as you know, except for Captain Levrier's decision to report this matter to Mr. Riley, that conversation or that comment did not disrupt the work that was going on in that data processing area, did it?

A. I wasn't back there at the moment.

Q. Okay.

A. I was in my office.

Q. In fact, Constable Rankin—I'm handing you what has been marked as Plaintiff's Exhibit Number 5. And that is a transcript of the testimony of a woman named Heidi Cornelison Hinojosa; is that correct?

A. Yes, sir.

[45]

Q. And Ms. Hinojosa was in fact another clerk deputy who was working in that data processing area on March 30, 1981; is that correct?

A. That's correct, sir.

Q. And she was sitting in that same work area where Ms. McPherson made the comment about President Reagan; is that right?

A. I don't know. I wasn't back there.

Q. It's true, is it not, that you were here at the summary judgment hearing that was had in this case a while back?

A. Yes, sir.

Q. And this transcript is accurate, that when Ms. Hinojasa was asked, "so when the statement was originally made, it had no impact on your work; is that correct?"

She answered, "No, it did not."

A. I haven't read her transcript. I don't know what it is. If that's her testimony, it did not interrupt her.

Q. Okay. And you haven't heard any other evidence from any of your other employees that their work was interrupted by the original conversation in which the statement about President Reagan was made?

A. I did not base my action on whether the work was interrupted or not. I based my action on a statement that was made to me direct.

Q. You asked her in the direct statement whether she had

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said, if they try again, I hope they get him; is that right?

A. Yes.

Q. And the answer was yes?

A. Yes.

Q. Okay. And it's your testimony that the next thing you asked her is, did you mean it. And she said yes.

A. Yes.

Q. Okay. And that is the statement for which you fired her?

A. Right then is when I lost confidence with her, and I told her that I didn't have a position in that office for her anymore.

Q. Okay. Constable Rankin, if you and I were having lunch together last Wednesday, let's say, and I said to you, I sure hope those 49'ers kill the Dolphins on Sunday, you would in fact understand that as not being a serious threat on the lives of the Miami Dolphin football team, would you not?

A. It's a lot different in playing football than it is the life of the President of the United States.

Q. Constable, you are going to get a chance to answer questions from your counsel. If you want to answer the questions I am asking, I would appreciate it.

A. Repeat it.

Q. If I said to you last Wednesday, I sure hope that those

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49'ers kill the Dolphins on Sunday, you wouldn't interpret that as being a threat on the lives of the Miami Dolphins football team?

A. Not knowing you, I couldn't say whether you meant it or not.

Q. So you would have to consider the context of the conversation; correct?

A. If you were working for me, I would know a little more about you, counselor.

Q. And you would have to consider who I was and what my history was; is that right?

A. Well, I don't know. To really get into the thing, I don't know why I would be at lunch with you, because as I say, I don't know you. I wouldn't know you, so I would not know what you meant by it.

Q. Suppose Mr. Lee was at lunch with you, talking about the case, and he said to you, I hope the 49'ers kill the Miami Dolphins on Sunday. You wouldn't take that as being a threat that Mr. Lee would go out and kill the Miami football team, would you?

A. I have never heard Mr. Lee have a desire to kill anyone, or make any kind—so I couldn't say that would be in Mr. Lee's mind. If he did and he meant it, I would be very greatly disappointed in him, and I have a lot of respect for Mr. Lee.

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Q. You would concede, would you not, that interpreting that statement, you would have to know more than just the words that were said in the statement? The football team comment? You would have to know more

than just what the English words spoken were, and in what order they were arranged?

A. Well, I'm a great big football fan, and I love it and everything, but I haven't been around anybody wanting a football team to be killed. I mean, it's just hard—this is far out.

Q. You never heard anyone use the verb kill in the context of a sporting event?

A. If I did, I don't recall it.

Q. The fact is, you never heard the conversation—the original conversation in which Ms. McPherson made the comment about President Reagan?

A. No, sir.

Q. And the fact is the only person that you ever talked to who heard that, was Captain Levrier; is that correct?

A. Until I had Ms. McPherson in my office.

Q. We are talking about the original statement.

A. No.

Q. Constable Rankin, you are a member of the White race, are you not?

A. Yes, sir.

Q. And Ms. McPherson is a member of the Black race; is that

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true?

A. Yes, sir.

Q. And Constable—and Deputy Levrier is a member of the White race; is that correct?

A. Yes, sir.

Q. As is Deputy Riley and Captain Abercia; is that right?

A. Yes, sir.

Mr. Griffiths: Pass the witness, Your Honor.

The Court: Mr. Lee.

Mr. Lee: Your Honor, I have no questions at this time of this witness. He is an adverse witness.

The Court: All right. Thank you, Constable Rankin. You can step down, sir, and have a seat at counsel table.

Call your next witness.

Mr. Griffiths: Call John Abercia, Your Honor. I mean Levrier. I'm sorry.

The Court: Would you step out and call Captain Levrier.

Just come up and have a seat, sir.

John M. Levrier, plaintiff's witness, sworn

DIRECT EXAMINATION

By Mr. Griffiths:

Q. State your name, please, for the record.
A. John M. Levrier.
Q. Mr. Levrier, how are you employed?

* * *

(Portions of Testimony of Lawrence Jackson)

* * *

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Q. Did Constable Rankin ever question you concerning the content of your conversation with Ardith McPherson?

A. To my knowledge, no.

Q. And did anyone else in the office ever ask you about what you and she had been talking about?

A. No.

Ms. Garcy: I'll pass the witness, Your Honor.

The Court: Okay. Mr. Lee.

Mr. Lee: I have no questions of Mr. Jackson, Your Honor.

The Court: Thank you, Mr. Jackson.

Ms. Garcy: Your Honor, plaintiff rests.

The Court: All right. What says the defendant?

Mr. Lee: Your Honor, I would like to call Constable Rankin on direct examination.

The Court: All right. Constable Rankin.

Walter H. Rankin, defendant's witness, previously sworn.

DIRECT EXAMINATION

By Mr. Lee:

Q. Constable Rankin, when we previously tried this case, a couple of years ago, you were at that time engaged

in what you term security work with visiting dignitaries. Is your office still engaged in security work?

A. When we are requested to assist, or called upon, yes.

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Q. All right. Since February of 1983, has your office been in any security work involving President Reagan in Houston?

A. Since '83, I don't recall. We have furnished personnel for so many, and it's almost on a regular—if he was in here, I'm sure that we had personnel assigned.

Q. All right. Tell the court some of the people whom you have represented in just the past year, and furnishing personal security for them.

A. Well, within the last year, one of the main functions for a week was Billy Graham, when he was here, and we handled all security there. The last most important assignment that we have had recently was for Jesse Jackson, on two occasions.

Q. All right. Do you have any trouble at all in handling your assignments for Jesse Jackson?

A. Not at all.

Q. Have you been specially requested to handle those assignments?

A. We have, on both occasions.

Q. When you are handling a personal security assignment, would you tell the court what kind of information is made available to you, that is not available to the general public?

A. We know arrival, which airport, which plane he is coming in, we know how many people will be with them, what route

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they will be taking, where they will be staying, and where they will be going and different places, because we furnish automobiles, and we furnish drivers and security to get them there and bring them back.

Q. All right. Does your office, in handling the security matters, divulge any of that to the news media or the general public?

A. No.

Q. Is that one of the terms under which you are selected as a security agency?

A. Well, for protection purposes, we fell like it's very confidential, classified information, and we do not give out the schedule. If it's going to be given out, it's going to be someone—by Mr. Jackson's staff, or someone there, but not by us.

Q. All right. Is there any danger in your office that any of your deputies will, with malice or just with negligence, make this confidential information available to other than your office staff?

A. I must have complete trust in the people I'm working there, because I—whoever might be typing, or the information there, or for my officers, is that I have to be comfortable with the people that I work with.

Q. All right. Do you make any particular effort to hide the security information made available to you on these

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security details, from any suspect people in your—among your deputies?

A. Not any of the people that works there do we have anything to keep from them.

Q. Do you consider it within your oath of office, which

is prescribed by the Texas Constitution, that you will uphold the Constitution and Laws of the United States and of the State of Texas—do you consider anything in those laws to keep you from being the cheering section for anyone wanting to break those laws?

A. As a law enforcement officer, my oath of office is to protect the Constitution of this State and of this Nation. To protect it; protect the people involved.

Q. All right. Do your consider somebody wanting any person summarily killed without benefit of trial, without benefit of clergy, just by .45 caliber jurisdiction, to execute anybody, as being beyond your oath of office?

A. Yes, sir.

Q. Do you consider your oath of office binding on you?

A. Yes, sir.

Q. Do you consider it just as binding on anyone whom you have deputized to be Constable Rankin to the public?

A. Very much so.

Q. Do you have any reservations about giving any job assignment, no matter how sensitive, to any of your deputies?

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A. I trust all of my employees.

Q. Do you consider that a necessity of the nature of your work?

A. Yes, sir.

Q. Is there any doubt in your mind—and especially since Ms. McPherson, from the stand there, has told you that she didn't mean anything by her verbal comments on wanting the President to be killed—is there any matter that you would reconsider in taking her back as your deputy?

A. I could not.

Q. Would you have any confidence in her if the court were to compel you to take her back?

A. Naturally I respect the courts very much. If it would see fit, then I would have to completely rearrange the function of my office. I would probably have to go to a very secretive office on the classified information. I would be very, very uncomfortable.

Q. To your knowledge, do you have any of your deputies who, in effect, ride with the cops and cheer for the robbers?

A. No, sir.

Q. Do you consider that inconsistent with their constitutional oath which they must take, also?

A. That's right.

Mr. Lee: Your Honor, I have no further questions of Constable Rankin.

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The Court: All right.

CROSS-EXAMINATION

By Mr. Griffiths:

Q. Constable Rankin, it's your testimony, then, that essentially you consider the entire area of your office to be a high security area which sensitive information that might be useful to a would-be presidential assassin can be freely circulated because all your people are trustworthy; is that right?

A. If I don't trust them, I would get rid of them.

Q. Okay. So you basically say that it's intolerable—that if you are a deputy of Constable Rankin's office, you

are privy to any secrets of that office, and there is no organization or classification of whom can be privy to secret information?

A. Well, the secret information, counselor, on the President of the United States—not for one moment do you think that the Secret Service is going to give me every move that's made. He is going to give—they are going to give me the information on what part we are going to handle, and the information my officers—on what we are doing. But as far as the very vital deal that, some things, certainly we are not going to have that. We understand that.

Q. And you can't imagine setting up a system where —or you haven't set up a system, let's say, whereby information

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of this sensitive type could be available only to the people who need to know it?

A. My personnel knows it, but as far as putting it out on the bulletin board out in the hall where other people can see it, no.

Q. Well, we are talking about—what? Eighty? How many employees in your office?

A. At that time, it was.

Q. Right. Okay. Now, are you saying that they are all equal in their right to know the information that the Secret Service has provided you about President Reagan or Jesse Jackson, or Walter Mondale, or whomever you are guarding?

A. All of my personnel takes great pride that my office and our people have been chosen to take a part, and—for instance, they take a lot of pride in the confidence that people—

Q. Would you answer my question. Are all of them equally—

The Court: Counsel, let's not shout. The question was are they all equally—do they all have equal access to this information.

The Witness: As far as schedule of where we will be, yes, sir.

By Mr. Griffiths:

Q. Constable Rankin. I'm handing you what has been marked

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as Plaintiff's Exhibit Number 1, which cover sheet identifies as the personnel file of Ardith McPherson. Would you look at that, please.

A. Okay.

Q. Look at every page.

A. (Witness complies.)

Q. Okay. Now, Mr. Lee has not objected to the admission of this as the personnel file of Ardith McPherson. Do you see anything wrong with that, in terms of it being a true copy of the personnel file of Ardith McPherson?

A. I didn't read every page on it, but if counsel accepted it, I'm not going to quarrel with it.

Q. Okay. Let's go through page by page. After the cover sheet, this page is essentially a calendar that shows when you were late to work; right?

A. Uh-huh.

Q. Okay. And this is another calendar that shows when you were absent for a doctor's appointment, or when you were absent in general; is that right?

A. Uh-huh.

Q. Okay. This is just a piece of paper that has some days and times for time where she made up time that she missed; is that right?

A. I presume it did. I wouldn't keep a record of it.

Q. That's what it appears to be?

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A. Right.

Q. This is a card—I don't know what you would call it. It has your name, address, work number, position, next of kin.

A. This card is a card I designed when I took office, of every person connected with my office, from myself on, from every deputy, every chief, every clerk, every reserve officer, anyone represented there is all information on them, with a photo, that the FBI, Secret Service, District Attorney's Office, on any complaint on any of my personnel, we can lay it out, or if we get a complaint on misconduct, we can lay all our personnel so people can evaluate and choose whoever might be.

Q. Okay. But this card—in essence, the information that it has, besides your name, telephone number, address and next of kin, and a driver's license number, is limited to a photograph; is that right? There is no fingerprint or anything like that on it, is there?

A. No.

Q. Okay. There appears to be a message—telephone message note, telling you that Mrs. Rankin had called you; is that correct?

A. Uh-huh.

Q. Dated 4-3.

A. Yes.

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Q. Okay. And this is a note—a telephone note telling you that some interested citizen had called and congratulated you for firing Mrs. Rankin; is that right?

A. Firing Mrs. Rankin?

Q. I believe—

A. I hadn't fired her yet.

Q. It says 4-3-81 is the date. It says, called to congratulate you on the stand that you took regarding the statement made about our President. Doesn't that sound like congratulations?

A. Yes, but that wasn't the way you—I know what you mean, so I guess I was just saying that, but—

Q. Okay.

Another phone message. This is—

A. But, counselor, as you might state, this information, although it was to me, and you have it, even most of these phone calls that I have is not hid from employees, good or bad, see.

Q. Fine. Fine. I'm just—we are just going through and seeing that this is in here. Okay.

This is the notice from the County Auditor, addressed to Ardith McPherson, telling her that her major medical deductible had been increased; is that right?

A. I see the auditor's name there.

Q. Okay. This is another insurance paper.

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A. Uh-huh.

Q. This is the change of status. Essentially the form that you filed, showing that she had been fired; is that right?

A. I believe. Yes.

Q. Okay. This is a form you filed with the county records when she was fired; right?

A. Yes, sir.

Q. Okay. Now, it doesn't have any information about her except her name, social security number and the effective date, the salary, that sort of thing.

A. Yes, sir.

Q. Okay. This is her Form W-4 that she filed to authorize your office, or the county auditors, to withhold taxes from her pay; is that correct?

A. Yes, sir.

Q. Okay. This is an application for employment. Okay. This application for employment is on one legal size page. It includes her name, social security number, address, telephone, next of kin, who she is replacing, how many hours a week she works. That's essentially it. And that was—it's styled application for and contract of employment; is that right?

A. Yes.

Q. Okay. This appears to be a physical form. That must have been a pre-employment physical; is that correct?

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A. I don't recall that. May have.

Q. Doesn't—it seems like one thing is checked. Okay. Here is something else from a doctor. Okay. Texas county and district retirement system personnel data. This is what she had to turn in to enroll with the county employees' retirement plan, is that right?

A. Yes.

Q. Okay. This is a certificate—a card that shows that she is a deputy; is that correct? And that's about all it shows.

A. Well, that's not from me. That comes after they have certified her, and for the court or auditor—the county commissioners has to certify her employment.

Q. Okay. So that comes from Anita Rodeheaver instead of from you?

A. Comes out of the clerk of the court. Yes, sir.

Q. Okay. This is a card to sign up for medical insurance?

A. Yes, sir.

Q. This is a—I guess what you call the real application. It's one legal size page. It shows name, address, next of kin, that her current hobbies are sewing and dancing, that she is an American citizen, and that she graduated from high school, has one year of college, shows the names of high school and the college. It says she has no relatives in county employment, she has never worked for the county—

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Harris County before, that she has operated a typewriter, switchboard, files, and gives Lawrence Jackson and Wilma Bomen as references. It says the position desired is clerk typist, and salary expected, $700 a month.

Do you agree with me that's substantially all the information on there?

A. Yes.

Q. Okay. And this is a typed piece of work which starts out, no one likes to look for a job. The person who is job hunting is naturally on the defensive.

And would you agree with me that that was probably a typing test?

A. I would guess so. I don't recall it.

Q. It has corrections circled on where something is typed.

A. I don't know if this was the test they gave her or not.

Q. All right. We have gone through every page of that; is that correct?

A. Yes, sir.

Q. Constable Rankin, are you seriously telling this Court that you expect every member of your staff to be entrusted with secret information about the travels of the President of the United States and similar dignitaries, and that the only investigation you made before you hired Ardith McPherson was to give her a typing test?

A. I'm not going to get on a mountain top and shout it out.

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It is there, and if I call upon Ms. McPherson to type up a work schedule for me, I want to be comfortable with her.

But still, you must realize that the main function of security for the President of the United States rests with Secret Service.

Q. I understand that, sir.

A. And we know what our duties will be.

Q. Okay. And then the—you have access, as a law enforcement officer, to the TCIC system, do you not?

A. Yes, sir.

Q. And the TCIC system is a computerized system that shows criminal arrest histories of individuals who have been arrested in Texas; is that correct?

A. Yes, sir.

Q. You didn't attach that to her personnel file before you hired her, did you?

A. I'm not even sure I had it at that particular date.

Q. Okay. Do you know what in NCIC is, sir?

A. Yes, sir.

Q. The same thing, except the FBI in Washington runs it; is that correct, sir?

A. Yes, sir.

Q. You didn't attach NCIC to that?

A. No, sir.

Q. Despite the fact that Ardith McPherson told you that she

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had recently moved to Texas from Bronx, New York.

A. I wasn't upset about where she had moved from.

Q. Okay. You also told me before that your office was open to all the people of Harris County who needed help.

A. That's right.

Q. And when I tried to get you to say that people didn't come back into Ardith McPherson's work place very often, you objected and said, well, if they need help back there, they were free to come back there. Isn't that correct?

A. We had no restricted area.

Q. So nonetheless, you are saying that all 80 employees are privy to secret information about the President of the United States' movements while he is in Houston, yet we let every member of the public who cares to, wander in and hang around, access to that area where all those employees are working?

A. It is not posted.

Q. Well, it could be sitting on a desk if somebody is typing it in the area she is working.

A. It would not be there. If it was typed up, it would be brought back into my office.

Q. So you are saying in fact you are careful with that information, not to widely distribute it; is that right?

A. We are not going to post it, counselor. After it's typed up, it's brought back into my care and control.

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Q. Is your basic position that Ardith McPherson shouldn't have to work for you because you are not comfortable with what she said?

A. My basic is that she could not work for me because I am not comfortable, period. I have lost all confidence in her. I gave her an opportunity. She convinced me of what she said. And so, no, I would not be comfortable with her.

Mr. Griffiths: Pass the witness, Your Honor.

Mr. Lee: No questions, Your Honor.

The Court: Thank you, Constable Rankin. You can step down.

Mr. Lee: Defense rests, Your Honor.

The Court: All right. Be glad to hear from you, counsel.

Mr. Griffiths: We have nothing on rebuttal, Your Honor. We do have an argument.

The Court: All right, sir.

Mr. Griffiths: Your Honor, I think that this issue, this question, is very clear. I think the evidence is essentially all on one side. The *Connick v. Myers* decision emphasizes that when we are talking about the First Amendment rights of a public employee, we are balancing the interest of the public office in operating and doing its job, versus the interest of the employee in question, in having a right to free speech.

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The *Connick* case essentially was decided on the issue of whether or not Ms. Connick's comment or questionnaire that she circulated among the members of that office staff were primarily concerned with questions of public concern, or whether they were primarily internal office problems which—the raising of which essentially amounted to insubordination.

I think in this case, the facts are very clear that the conversation which took place had nothing to do with the operation of that office or with Ms. McPherson's duties within that office. In fact, the evidence is crystal clear it would have had no impact on the operation of that office, if Captain Levrier had not taken it upon himself to make an issue of the statement. Essentially, it was a conversation about President Reagan. It was a conversation about his policies. It was a private conversation between two people who were very close, and was not intended for general distribution.

The evidence that the fellow workers didn't even pay any attention to it, didn't even know the comment had been made until Ms. McPherson had been fired, demonstrates to me very clearly that the *Connick* test is not being met by the evidence in this case. That is, a test for dismissal, simply because there isn't any interference with the operation of the constable's office.

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The dichotomy between public concern and internal affairs weighs down completely on the side of public concern. The question of how this statement is to be understood, I think is important, and virtually crucial.

The only way that this statement could be understood as interfering with the operation of this office, of the constable's office—would be essentially if it were to be understood as saying that I, Ardith McPherson, intend to actively work for the assassination of President Reagan. It certainly is not that on its face. It, I don't think, can reasonably be interpreted as being such a statement by anybody.

I think it was clearly a statement made under exciting circumstances. It was something that essentially amounted to, I don't like Ronald Reagan and Ronald Reagan has been thrust to my attention by this radio report.

The fact that it could not interfere with the operation of this office is shown quite clearly by Constable Rankin's testimony. It's absolutely clear Ardith McPherson, without some 400 hours of training, could not—and considerable screening—could not have been assigned to guard any visiting dignitary. As Constable Rankin said several times, the job of guarding the President is that of the Secret Service of the United States.

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Constable Rankin's role here in Harris County is essentially the service of civil papers, and several other similar types of duties. The job of guarding dignitaries is a sideline; one that he takes great pride in, but is not the major job of his office. And it's clear that under virtually no imaginable circumstances would Ardith McPherson have any great role in guarding the life of the President of the United States. And I believe that that fact is demonstrated very clearly by Exhibit 1, which shows that if Constable Rankin took this seriously—and certainly we have to believe that he is sincere about wanting to protect the

people that he is guarding—I certainly believe he is—if he took that seriously, he certainly would not have hired anybody for the kind of high security role that he now wants to put on Ardith McPherson, without somewhat more of a background check. Even just the simple act of running a computer check in channels available to law enforcement agencies wasn't even performed.

You don't hire people to handle high tech—high security about the President of the United States, and pay them minimum wage, Your Honor. The notion that Ardith McPherson would ever have anything to do with protecting the President of the United States is nothing but a red herring. The real fact is she was hired to type data into the computer. She typed data into the computer

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satisfactorily. There is no evidence that suggests otherwise. And there is no evidence that suggests that this statement disrupted the course of the job that she was hired to do, or interfered with anybody else in the constable's office doing his or her job.

We talked about the question of intention, and we called Professor Kochman, who testified about some of the issues which arise when you try to figure out what other people mean.

I think in this case that the issue of intention is an important one to look at, and to analyze very closely. The court suggested in its colloquy with the witness, that if Chicago Publisher McCormick—Colonel McCormick had had a columnist who wrote as the lady referred to did, that she felt like machine-gunning the bus load of people, that she wouldn't have worked for the Tribune

much longer, and that may very well be true, but it is important to note that Colonel McCormick was not bound by the First Amendment.

It's clear, as Constable Rankin states—admits—that he cannot—should not—fire people for their political opinions. He could not and cannot fire them simply because they have some view about the world which is different from Constable Rankin's view. And that is what this case essentially comes down to.

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The court also suggested in its colloquy that the issue of self-defense—should we apply different standards to Black people and White people, to whether or not someone reasonably acted in self-defense. And the court cited the recent newsworthy situation involving Mr. Goetz in the subway in New York.

An important distinction there is the law of self-defense is perfectly clear, Your Honor, that the relevant state of mind is that of the person acting in self-defense. The recipient of the communication. And that is clear-cut. That is not the law in this case. The law in this case, I would submit, is laid down in *McPherson v. Rankin,* where it says, in determining whether private speech by a public employee is entitled to First Amendment protection, it is important to consider the context in which it is made, relevant considerations, including the manner, time and place in which it is delivered, and the intent of the speaker.

Not the understanding of the hearer, but the intent of the speaker. I think it's important to notice in determining the—and certainly we can only determine intent by

objective evidence, and to some degree circumstantial evidence; we don't know what the speaker is thinking at the moment she speaks. But we do have one very important piece of objective evidence, which is the

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only person who heard the conversation with Lawrence Jackson. He had worked in that office for some time at that point. He was a commissioned Texas peace officer at that time. He was the lover of Ardith McPherson.

He heard that conversation. And he didn't say, hush, Tiki. Be quiet. They are going to hear you. You are going to get fired. He knew what was appropriate. He took it as being just what it was intended to be, which was a conversation or a comment on a piece of news—rather unusual news—that had come over the radio while they were listening to the conversation. And I think that is the most—the best piece of objective evidence as to what the import of that conversation was.

Captain LeVrier says he doesn't remember anything except she said, I hope they get him next time. That's credible evidence because Captain LeVrier was basically not listening to that conversation. He was listening to the radio. And if you believe the testimony of Mr. Jackson, he was listening—he was discussing this with some of the other workers in the area.

Lawrence Jackson, who heard the conversation, didn't see it as being something that threatened his girlfriend. Didn't see it as being something she ought to be quiet about and hush up. Even when LeVrier came over and asked her about it, he still basically—one has to

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assume because the whole conversation seemed so trivial to him basically—was not, you know, did not get defensive, or jump and say, you can't do that, or start saying things on her behalf. He just basically took it as being a rather unimportant thing that happened, indicating that his perception of the conversation was that it was not a serious threat, or even a very serious comment on what they had just heard.

So the question is intent. And if we listen to Professor Kochman, he tells us that the fact that the two people having the conversation are Black, may not make a big difference, but it makes some difference, and one of the things is that Black culture tolerates a greater degree of sort of verbal flamboyance. They don't see talking, as such, as entitling somebody to retaliate. And I think that that is one more factor that needs to be considered in deciding what the intent was of Ardith McPherson.

I think it's also important to note that the original decision-maker, Mr. Rankin, made no determination to determine what the intent of Ardith McPherson was, except by his own testimony was a very hurried conversation where he said, did you mean it, and she said, yes.

Now, I respectfully submit that "did you mean it?" is not considering the manner, time and place, and the context, and all the things that the court tells us we have

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to consider. It is not a serious attempt to determine what her intent was.

I think this proceeding certainly is a serious attempt to consider what her intent was, and I think the evidence

shows very clearly that her intent was not such that it presented any serious threat to the President of the United States. To corroborate that, we look at the reaction of the Secret Service, which came out and interviewed her, at the request of Constable Rankin, and apparently never made any more moves to contact her, indict her, prosecute her, keep an eye on her when President Reagan was subsequently in town, or anything else that showed that they regarded her as a serious threat. I have to say the Secret Service Agent, based on Ms. McPherson's testimony, made a more serious attempt to determine what her intent was than did Constable Rankin.

Finally, Your Honor, I would like to talk briefly about the First Amendment, in general, because after all, that is what we are litigating in this case. One of the reasons for having the First Amendment is that we have a democracy, and we need a free marketplace of ideas to assure that democracy makes a wise choice, and that is why politically—

The Court: How would you respond to a comment, let's kill all the ACLU lawyers, as free speech, counsel?

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Mr. Griffiths: Your Honor, I would—in fact, I have received such comments in the mail regularly, and I respond to it as being free speech, Your Honor.

The Court: Okay. A man of principles.

Mr. Griffiths: The First Amendment is involved with great ideas, political discourse, and I would submit that this is political discourse on a very down-to-earth level. The First Amendment is also involved, I would submit,

with personal freedom. Not political freedom, but personal freedom. And what I mean by that—

The Court: Wasn't Ms. Myers just engaging in personal political discourse? And she got fired over that question.

Mr. Griffiths: She got fired because she was systematically disrupting the functioning of her employer's office. And I submit that the evidence shows that there was no disruption in this office as a result of anything Ms. McPherson said. I think that's a critical difference.

The Court: You really think that's all?

Mr. Griffiths: I think that Ms. McPherson's comment was to a public issue. It also was a very private conversation. And I think the First Amendment—one of the reasons for it is to protect us from having secret agents looking over our shoulders all the time and bringing us to account for essentially idle comments that may pass our lips

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from day to day.

I think that part of the notion of having regulation of wire taps, the notion of the Fourth Amendment in terms of the privacy of our homes, is strictly to make this so it remains not a police state where we have to worry about every word that we say. And I would submit to the court that this particular conversation is a great example of that right; a conversation that is deserving of that protection. Thank you.

The Court: Go ahead, Mr. Lee.

Mr. Lee: Thank you, Your Honor.

The Court: I hope you are not going to stress too much her position as a quasi-secret service agent.

Mr. Lee: I will do my best to eliminate that from my prepared speech, Your Honor.

The Court: All right.

Mr. Lee: The Secret Service Agent who did come out and interview Ms. McPherson, though, was not looking at her as his deputy, or as his fellow worker, but he was looking at her as an object of suspicion, and his suspicion that she, herself, posed no threat to the President was quickly satisfied.

Now, that is not the same context in which Constable Rankin was looking at her when he, himself, face to face with her, asked her if she had said that she

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would like to see the President killed, and her statement to him that she would.

Now, this is his alter ego. Now, she just may be punching in the computer information there, but if that is one of the duties of his office, and if he does not have a deputy doing that duty, then he, himself, has to do that duty. He does have a deputy to do that, a deputy whom he thinks is going to be Constable Rankin in the eyes of the public there.

He is sworn to a constitutional oath. His deputies are sworn to the same constitutional oath. And in the eyes of the public, his deputy is him. He has more than 100 deputies in the eyes of the public. When they see any one of them, that is Constable Rankin, to them.

His duties are so big that he, himself, cannot possibly do all of his work without the help of deputies in whom he has confidence, because he is given statutory obligation and liability for everything that his deputies do to the public and for the public, so he must have confidence in them, because they have the power to make him famous, to keep him employed, and they also have the same power to ruin him.

Now, he, of course, has a very personal outlook at it. And when he brought Ms. McPherson in to tell him exactly what she said, and she said exactly as she has

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pleaded in her complaint before this Court here, as to what she said, and he then asked her for reassurance as to what she meant, and he says that she gave him the assurance that she did mean it.

Now, we have Captain Levrier, when he first heard it, and he asked her, and he said that she said that she meant it. He said, you don't mean that, and he says she said, she did. She says she just looked at him and smiled. Now, that is not normal procedure, to deal with a superior officer of the rank of a ten-week beginner who hasn't even gotten tenure yet, and a captain of the hierarchy with more years in service as a law enforcement officer than she had years on this earth here at that time.

The officers—Captain Levrier and Chief Deputy Abercia—now, Abercia is very busy running the office of the Constable while the Constable takes care of public relations work, in part—he does a lot of his own work, but during an interruption there, he did not hear Ms. McPherson state that she did mean it. But from the gist of

the conversation that he heard while his attention was distracted, he also is of the viewpoint that she did.

Now, this is fine and good for someone out in the streets. In the Constable's deposition that was taken by Ms. McPherson—in the deposition, he was asked what would a librarian do if she heard an assistant

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librarian say this. Well—

Mr. Griffiths: Objection. This is outside the record.

The Court: Just argument, counsel.

Mr. Lee: Librarians we don't have before us. We have a Constable and one of his deputies. They are sworn to a different oath. We don't have any idea what kind of an oath a librarian swears to. A citizen on the street doesn't have to swear to uphold the Constitution and laws. All he has to do is avoid being caught whenever he breaks any of them. This is a different mission from a law enforcement officer who is a very special person in our type of society here. The standard for them is much greater, because the power that they exercise is much greater.

We are liable and responsible for what we say. And there are not different meanings given to different words by different people. We have here an exact statement shown in her Complaint, in her own words, and the Constable reacting to those words there.

Now, the Constable must have confidence in all of his deputies. We are not ordinary citizens. We are law enforcement officers. We are held to a higher standard because we are insisting that the citizenry themselves hold them-

selves to a higher standard than they would were we not out there to compel them to do so.

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Now, it is not a proper law enforcement obligation to espouse that we will determine the President of the United States by bullets rather than ballots. We have, unfortunately, too much history in this nation of bullets deciding what ballots have determined not to someone's liking there.

The law enforcement officer is to uphold the law through the ballot, and to advocate a violation of laws—and it's a violation of the laws of Texas to kill someone, and all men are created equal, so the President is just as much an object of the law as John Doe down on lower Congress Avenue here. It is illegal, no matter who we kill. And for a law enforcement officer to advocate killing, it is a different cut of cloth than to have the reporter for the Chicago Tribune to advocate the machine-gunning of all the whites there.

It is possibly consistent with her caliber in the Chicago Tribune matter there, to espouse that, although the doctor said that she did not really say exactly what she was quoted as saying. But, again, that is playing with words there. That was the gist of her feelings there. But she wasn't a law enforcement officer. She wasn't sworn to uphold the law, and then espousing the breaking of the law.

It was disruptive to the Constable's office to

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have someone who is not marching in step to our drummer, here in our midst as one of us. If we were

talking about the Dolphins and the 49'ers, this would be just like a guard on the Dolphins coming back to the huddle there and telling the quarterback, Marino, that I hope that linebacker for the 49'ers smears you on the next play.

This is inconsistent with our team pattern here, and it is not a variation that we can live with, and it is not a variation that the Constitution expects a law enforcement officer to live with. Thank you.

The Court: All right.

Last word, Mr. Griffiths.

Mr. Griffiths: Very briefly, Your Honor. If this case hinges on Ardith McPherson being a law enforcement officer, I would suggest to the Court that the evidence was essentially uncontroverted that she was not such an officer. She was not trained, she was not commissioned, she was not authorized under the laws of the State of Texas to perform any service as a law enforcement officer. She was paid minimum wage to type documents—data off civil papers into the computer. That is her job. That is the undisputed evidence, that that was her job. And if she—if this argument—which apparently does rest on her being a law enforcement officer—then it must fail.

The Court: This is not any easier the second time

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around than it was the first. I have the greatest respect for the plaintiff's position on free speech. I have an equal respect for the responsibility of a constable to maintain a proper office environment. I suppose while listening to the testimony this second time and re-reading the Fifth

Circuit's opinion and re-reading *Connick v. Myers,* I think I understand what the courts are trying to tell us.

There is no question but that Constable Rankin, in his decision, was bound by the First Amendment, through Section 1983. There is no question that Ms. McPherson was a probationary public employee; no question but that she was discharged. I really don't believe there is any question about what she said. In the context of the President's near assassination, she said words to the effect, "if they go for him again, I hope they get him."

The real dispute in the testimony was whether she affirmed those words to the captain who first approached her at her terminal, and once again to Constable Rankin. I believe that by words or deeds, she conceded having said those words to them, and made no attempt to retract them.

But I'm not sure that the real question in this case is what she meant. I think the language we are taking is from the case of *Bickel v. Burkhart,* and that is the language that is important in determining whether private speech by a public employee is entitled to First

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Amendment protection. To consider the context in which it is made relevant considerations, including the manner time and place, and of course later on, the Fifth Circuit says intent relates to context, so I guess the ideas of intent, manner, time and place all tie in to a definition of this equally ambiguous term, context.

The remarks that Ms. McPherson made were made to another employee, Mr. Jackson, in the hearing of a superior officer. I suppose that by the definitions I have

seen, that is certainly private speech. I suppose that is what the Supreme Court and the Fifth Circuit means by private speech, as opposed to going to the public with these things. I'm not sure what the questionnaire in *Myers* was. I guess it was private speech, as well. The questionnaire was rather broadly distributed, but it did concern only internal office matters.

Now, let's put what Ms. McPherson said, in context, as the cases tell us to do. The statement was made so that it sounded like a comment to a radio news report on the attempted assassination of the President. I had the erroneous impression at the original hearing, and carried it to the Fifth Circuit, that this was during her lunch hour, and it apparently was not. It was during the lunch hour, but she was actually on duty, as she just testified a few minutes ago. It was made in the office of the constable,

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while she was on duty.

What is the intention of the speaker. I hope that the plaintiff is not suggesting that the intention of one race must be decided by different standards than the intention of another race. That, I find a very disturbing and disquieting theory. If we are to carry Dr. Kochman's philosophy into the law, then the constable ought to treat people differently because of their race, and that is clearly against the law.

I think that the constable was entitled to listen to the words that were said by Ms. McPherson, when she repeated them to him, were confirmed that she had said them to him, and judge those words by their ordinary English context. The constable never accused Ms. Mc-

Pherson of threatening to go shoot the President again, as Mr. Hinckley had just done. Although he did report this episode to the Secret Service, he did not fear her because she threatened to do harm to the President.

Then I suppose we get down to the serious question, what did she "mean." I don't believe she meant nothing, as she said here today, and I don't believe that those words were mere political hyperbole. They were something more than political hyperbole. They expressed such dislike of a high public government official as to be violent words, in context. This is not the situation where

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one makes an idle threat to kill someone for not picking them up on time, or not picking up their clothes. It was more than that.

It's not like the *Myers* case where Ms. Myers was trying to comment upon the internal affairs of the office, or matters upon public concern. I don't think it is a matter of public concern to approve even more to the second attempt at assassination.

I believe Constable Rankin is very concerned about the character and trustworthiness of the people in his office, as he is certainly entitled to be. He does do a great deal of work with the public. If the people he hires mistreat the public, disappoint the public, insult the public, Constable Rankin is not going to get re-elected, and he is not going to be following his sworn oath.

Certainly he had some concern about the security questions that Ms. McPherson would have access to; delicate information about the whereabouts of the President. I think that is far less significant in his motivation

than the question of the statement by Ms. McPherson, indicating to him she was the kind of person who would be a bad employee, would be a negative influence in the office.

I think what we have at this point is the *Pickering v. Board of Education* balance test. Who has more right? Ms. McPherson, to say, if they go for him again, I

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hope they get him, or Constable Rankin's right to promote the efficiency of the public service, through his employees.

In looking at the balancing test, I have got to go with Constable Rankin, as I did on the initial hearing. I think applying the *Mt. Healthy City School District Board of Education v. Doyle* test, number one, is the communication protected, no, I do not believe it is. I do not believe that that is protected speech. But applying the second part of the test, it certainly was a substantial part in the decision to fire her, and I doubt that he would have fired her had she not made that comment. I know I'm not required to reach the second two points, having found against the plaintiff on the first.

In the context of those remarks, I do not believe that they were protected speech, and I believe that forecloses her under *Mt. Healthy* and *Garza v. Rodriguez*. All of these cases, of course, are cited by the Fifth Circuit.

I would have to do what I did before, after hearing the evidence before, and that is hold for the defendant.

Anything further, counsel?

Mr. Lee: Nothing further.

Mr. Griffiths: Nothing further.

Mr. Lee: Thank you, Your Honor.

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The Court: Thank you very much for presenting this matter in a straightforward and efficient manner.

Mr. Griffiths: Your Honor, is the court—is that opinion from the bench the court's opinion?

The Court: Those will be my Findings of Fact and Conclusions of Law.

Mr. Griffiths: Thank you, Your Honor.

(Proceedings concluded.)

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-81-1442

ARDITH McPHERSON,
Plaintiff

v.

WALTER RANKIN, et al.,
Defendants.

(Filed February 4, 1985)

FINAL JUDGMENT

Pursuant to Federal Rule of Civil Procedure 58 and based on the findings of fact and conclusions of law entered on the record in this cause, judgment is hereby entered for Defendants. Plaintiff's claims for relief are in all ways denied. Each party in this action shall bear its own costs.

This is a FINAL JUDGMENT.

Done at Houston, Texas, this 4th day of February, 1985.

/s/ NORMAN W. BLACK
Norman W. Black
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 85-2129

OPINION

ARDITH McPHERSON
Plaintiff-Appellant,

v.

WALTER RANKIN, Individually and in his Official Capacity as Constable, Precinct One of Harris County, Texas, and HARRIS COUNTY, TEXAS,
Defendants-Appellees.

(Filed March 19, 1986)

Before: Jerre S. Williams, Patrick E. Higginbotham, and W. Eugene Davis, Circuit Judges.

Opinion by Judge Patrick E. Higginbotham

Appeal from the United States District Court
for the Southern District of Texas

Norman W. Black, District Judge, Presiding

SUMMARY

Civil Service/Constitutional Law

Appeal from district court decision upholding the dismissal of a public employee after finding that a remark she had made was not protected speech. Reversed and remanded.

Ardith McPherson was a clerical worker in a Houston, Texas constable's office. After hearing a radio report of the attempted assassination of President Reagan on March 30, 1981, McPherson said to a co-worker: "[I]f they go for him again, I hope they get him." The statement was made to the co-worker at the end of a discussion about the President's policies. A deputy constable overheard the statement and reported it to Constable Rankin, who immediately questioned McPherson about it. When McPherson acknowledged both that she made the statement and that she meant it, Rankin fired her. McPherson filed suit against both Rankin and the county. The district court held that the remark was more than mere political hyperbole, that it was not protected speech, and that Rankin could fire her for it. On appeal, McPherson argues that the district court erred in not recognizing the political nature of her speech and in concluding that it was not within the protective ambit of the first amendment.

[1] Only when a government employee engages in expression addressed to "matters of public concern" does the first amendment protect him from termination for such expression. If it is established that the speech in question is addressed to "matters of public concern," the first amendment interest in protecting the employee's freedom of speech must be balanced against the government's interest in maintaining discipline and efficiency in the workplace. [2] The record supports the district court's conclusion that McPherson expressed an actual wish for the assassination of the President. Although she has denied that this was her view and she is supported by the only person who heard the remark in context, her statement to Rankin that she "meant" what she said pro-

vides the requisite support for the district court's "factual" finding. [3] Regardless of her intent, however, her comment clearly addressed a matter of public concern, be it a hyperbolic expression of unhappiness with the President's policies or an actual wish for his assassination. Therefore, the value of protecting her right to express her opinion, however loathsome, must be weighed against competing interests of the constable's office in the effective and efficient fulfillment of its law enforcement responsibilities.

[4] Here, the government's interest does not outweigh the first amendment interest in protecting McPherson's speech. Her comment was made to a co-worker who, with the benefit of the remark's full context, was not offended. Constable Rankin specifically denied having fired her because of any disruption caused by her comment, and the evidence did not show that the remark threatened the future efficiency or morale of the office. [5] Although a government agency is entitled to employ only those individuals who have no serious reservations about the fundamental mission of the agency, [6] because of the utterly ministerial nature of her duties, McPherson's potential for undermining the office's mission was trivial. She was one of a dozen clerk-typists, she was not a law enforcement officer, her job did not bring her into contact with the public, and she had no access to sensitive or important files. Under these distinct circumstances, McPherson could not be constitutionally fired for her expression of political opinion. Absent evidence that a government employee's views are inconsistent with the mission of the employing agency *and* with the employee's role in that agency, tolerance is required.

OPINION

PATRICK E. HIGGINBOTHAM, Circuit Judge:

On March 30, 1981, President Reagan was shot. After hearing a radio report of the attempted assassination, Ardith McPherson, a clerical worker in a Houston, Texas constable's office, said to a co-worker: "[I]f they go for him again, I hope they get him." A deputy constable overheard the statement and reported it to Constable Rankin, who immediately summoned McPherson to his office to question her about the remark. When McPherson acknowledged both that she had made the statement and that she meant it, Rankin fired her.

McPherson sued Rankin and Harris County under 42 U.S.C. § 1983. After the district court granted defendants' motion for summary judgment, a panel of this court remanded for a trial on the merits. Noting McPherson's contention that "her statement was merely a form of political hyperbole and was not intended to advocate harm to the President," *McPherson v. Rankin,* 736 F.2d 175, 178 (5th Cir. 1984), the panel observed that "[t]he issue of McPherson's intent is relevant to the present inquiry because it is imperative that a court's characterization of speech as political expression, for purposes of First Amendment protection, be predicated upon consideration of its 'content, form, and context.'" *id.* at 178-79 (citation and footnote omitted).

After the ordered trial, the district judge ruled from the bench, explaining:

> I'm not sure that the real question in this case is what she meant. . . . I suppose . . . that [this] is certainly private speech . . . I don't believe she

> meant nothing, as she said here today, and I don't believe that those words were mere political hyperbole. They were something more than political hyperbole. They expressed such dislike of a high public government official as to be violent words, in context. This is not the situation where one makes an idle threat to kill someone for not picking them up on time, or not picking up their clothes. It was more than that.

The court also found that Rankin had a need for employees who will not "mistreat the public, disappoint the public, [or] insult the public," and concluded by purporting to balance McPherson's speech-related interests against the interests of the constable's office in law enforcement. In holding that McPherson's remark was not protected speech, the court seems to have concluded both that McPherson actually hoped that the President would be killed and that Rankin could fire her for that view. In Constable Rankin's colorful words, he ought not be required to employ a person who "rides with the cops and cheers for the robbers."

II

McPherson argues that the district court erred as a matter of law in not recognizing the political character of her speech and in concluding that it was not within the protective ambit of the first amendment. She also urges that the interests of her employer do not outweigh her rights of free speech. Defendants reply that McPherson espoused "a violation of the criminal law of murder . . . completely inconsistent with the oath to uphold the laws to which both the Constable and the Deputy have been sworn [and that it] is not only the

right of the Constable but also his duty to terminate a Deputy's appointment when that Deputy apparently desires to see the criminal laws violated."

III

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Hornbook law informs us that the first amendment, as applied to the states, *Wallace v. Jaffree,* 105 S. Ct. 2479, 2486 (1985), protects a very wide range of speech from suppression by the government. *See, e.g., Brandenburg v. Ohio,* 395 U.S. 444 (1969). Although not all spoken words are covered by the first amendment, *Konigsberg v. State Bar,* 366 U.S. 36, 49 n. 10 (1961), constitutional protection extends to expression concerned with private matters, *Erznoznik v. City of Jacksonville,* 422 U.S. 205 (1975), as well as to speech that takes place in private. *Givhan v. Western Line Consol. School Dist.,* 439 U.S. 410, 415-16 (1979). A state would therefore face considerable constitutional obstacles if it sought to criminalize the words that were uttered by McPherson on the day the President was shot.

[1] The government has not sought to prosecute McPherson as a criminal, but to terminate her from a public job, which presents a very different set of legal questions. *See Pickering v. Board of Education,* 391 U.S. 563 (1968); *Connick v. Myers,* 103 S. Ct. 1684 (1983). Only when a government employee engages in expression addressed to "matters of public concern" does the first amendment protect him from termination for such expression: "ordinary dismissals from government service which violate no fixed tenure or applicable statute or regulation are not subject to judicial review even if the

reasons for the dismissal are alleged to be mistaken or unreasonable." *Connick,* 103 S. Ct. at 1690 (citations omitted). This rule is based on "the common sense realization that government offices could not function if every employment decision became a constitutional matter." *Id.* at 1688 (footnote omitted). If it is established that the speech in question is addressed to "matters of public concern," we are required to balance the first amendment interest in protecting the employee's freedom of expression against the government's interest in maintaining discipline and efficiency in the workplace. *Id.* at 1686. In striking this balance, we must give "*full* consideration [to] the government's interest in the effective and efficient fulfillment of its responsibilities to the public," *id.* at 1692 (emphasis added), and we must *not* demand that the government employer "allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action," *id.* (footnote omitted).

With these well-worn principles in mind, we must first decide whether McPherson was fired for her expressed views on a matter of public concern. She has maintained throughout this litigation that her statement was meant as a criticism of the President's social and economic policies, and no one has contended that she could constitutionally be fired merely for criticizing those policies. A difficulty arises, however, because she chose such a repulsive, nigh obscene, manner of making her criticism. Had she been fired solely for the disgusting manner of her expression, the first amendment would arguably pose no barrier to Constable Rankin's employment decision. We doubt that public employees could wrap the protective mantle of the first amendment around a string

of gutter words simply by appending a remark to the effect that those words describe some public figure or policy.

However, McPherson was undoubtedly fired because of the *content* of her speech. The district court judge found that McPherson's comment was "something more" than political hyperbole and he was apparently persuaded that she was fired because she honestly hoped that any future assassination attempt would be successful. Whatever her subjective intent, that is what she said and it is quite plausible that Rankin was telling the truth when he said that that is why he fired her.[1] Because the life and death of the President are obviously matters of public concern, we are therefore required to engage in *Pickering/Connick* balancing and to decide whether society's interest in protecting McPherson's freedom of speech is outweighed by the constable's interest in having employees who do not favor political assassination.

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Constable Rankin is elected to a four-year term on a partisan ballot from Precinct One in Harris County, Texas. This precinct, with approximately three hundred fifty thousand residents, encompasses downtown Houston and a portion of its suburbs. It is wholly within the police jurisdiction exercised by the City of Houston and nearby suburban municipalities. The constable's office, which had eighty-odd employees in 1981, has no direct law enforcement role, and none of its deputies are "on

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1. Were there a substantial contention that McPherson was actually terminated for expressing disapproval of the President's policies, we would be faced immediately with the standard-of-review problems discussed *infra* Section III.3.

the street." Its primary mission is the service of process and execution of warrants issued by courts whose criminal jurisdiction is limited to Class C misdemeanors, which carry a maximum fine of two hundred dollars. Approximately eighty percent of the office's work involves the service of civil process, mental health warrants, and bringing juveniles to the courts. Though Rankin hinted that his office might somehow participate in providing security during presidential visits to Houston, he never explained how this might be, and the district judge did not regard it as a serious suggestion.

All employees in the office are officially referred to as "deputy constables," but only those who are commissioned peace officers may carry firearms, serve process, or execute warrants. To become a commissioned peace officer, one must undergo a background check, a psychological exar , and over 300 hours of training. McPherson, who received only two days of computer instruction when hired, was not a commissioned peace officer. She played an entirely clerical role within the office: seated at a desk with no phone, in a room of computer terminals closed to the public, her duty was to enter data from court papers into a computer's memory by typing at a conventional CRT.

McPherson testified without contradiction that her statement about the attempted assassination was made at the end of a discussion about the President's policies with a co-worker, Lawrence Jackson, whose duties were identical to hers. At trial, Jackson corroborated McPherson's testimony and explained that he understood her remark as merely "a response and an expression." He was not cross-examined. McPherson testified that Constable Ran-

kin did not allow her to explain the context of the overheard remark; Jackson, the witness to its context, was not consulted. Indeed, Rankin does not deny that the remark was part of a discussion between two employees about their opinions of the President's policies; he testified that because McPherson conceded that she "meant" the remark, he felt no duty to inquire further.

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For the purpose of applying the *Pickering/Connick* balancing test, we accept the district court's conclusion that McPherson actually hoped that the President would be assassinated. The precise fit of the clearly erroneous standard of review and our duty to make "an independent constitutional judgment on the facts of the case," *Connick*, 103 S. Ct. at 1692 n. 10 (quoting *Jacobellis v. Ohio*, 378 U.S. 184, 190 (1964) (opinion of Brennan, J.)), is not altogether clear. We are enjoined to "determine the meaning and application of those words of [the Constitution] which require interpretation to resolve judicial issues. With that responsibility, we are compelled to examine for ourselves the statements in issue and the circumstances under which they were made to see whether or not they . . . are of a character which the principles of the First Amendment . . . protect." *Pennekamp v. Florida*, 328 U.S. 331, 335 (1946) (footnote omitted). The task of simultaneously applying both independent and deferential standards of review is of course more difficult at their juncture than at their distant edges. *See generally, Bose Corp. v. Consumers Union of United States, Inc.*, 104 S. Ct. 1949 (1984). For example, when what was said and its context are undisputed, the con-

stitutional "status" of the speech is to be independently examined by an appellate court. When what was said, but not its context, is disputed, the choice belongs to the trier of fact; on appeal, the determination of what was said is subject to review by the clearly erroneous standard, and the constitutional "status" of the statement is given independent review. Yet, when a factual dispute centers not on what was said but on its context, the deference due a trial court's findings becomes less certain: factual conclusions about the speaker's intent, audience effect, and other elements of context are not so easily disentangled from a decision as to whether a statement was "political" or directed at "public concerns."

[2] With this caution in mind, we find that the record supports the district court's conclusion that McPherson expressed an actual wish for the assassination of the President. It is true that she has at every stage of this litigation denied that this was her view or the purpose of her statement, and she is supported by the only person who heard the remark in context. McPherson's subjective intent, however, was an historical fact, and her statement to Rankin that she "meant" what she said provides the requisite support for the district court's "factual" finding, which may have been based in part on the demeanor of the witnesses. The question is close, resting ultimately on an inference drawn from the inevitably ambiguous response to the question, "Did you mean it?" That inference is a slender but adequate reed: we are not left with the firm belief that a mistake was made in this finding of fact by the district court.

[3] Regardless of her intent, however, McPherson's comment clearly addressed a matter of public concern.

Whether her statement was an hyperbolic expression of unhappiness with the President's policies, or an actual wish for his assassination, it was evoked by and addressed to serious matters of public concern. Thus, the value of protecting her right to express her opinion, however loathsome, must be weighed against the competing interests of the constable's office in the effective and efficient fulfillment of its law enforcement responsibilities.

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[4] We are persuaded that the government's interest in maintaining an efficient office does not outweigh the first amendment interest in protecting McPherson's freedom of expression. Her comment was made to a coworker who, with the benefit of the remark's full context, was not offended. Constable Rankin specifically denied having fired her because of any disruption caused by her comment, and the evidence did not show that the remark threatened the future efficiency or morale of the office.

[5] The government's strongest argument lies in Constable Rankin's contention that he should not have to employ *anyone* who "rides with the cops and cheers for the robbers." We understand this to mean that a government agency is entitled to employ only those individuals who have no serious reservations about the fundamental mission of the agency. Just as a hospital has a legitimate interest in ensuring that its employees are not committed to euthanasia, so a law enforcement agency cannot be expected to carry out its mission through officers who favor political assassination. We therefore agree that Constable Rankin's action in dismissing McPherson was

based on an important and legitimate government interest.[2]

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2. The government's interest in requiring that employees be loyal to the mission of the agency for which they work is somewhat different from the government's interest in limiting employees' criticism of their supervisors. The distinction can be illustrated by comparing this case with *Yoggerst v. Hedges*, 739 F.2d 293 (7th Cir. 1984). In *Yoggerst*, an employee of a state agency, after seeing newspaper reports that the agency's director had been fired, asked a co-worker, "Did you hear the good news?" After being disciplined for this remark, the employee resigned and brought suit pursuant to 42 U.S.C. § 1983. The Seventh Circuit held that the remark was not speech on a "matter of public concern" under *Connick*: "It is clear from the content of Yoggerst's statement that she was speaking *in her role as an employee* about her personal feelings and not in her role as a citizen on a matter of public concern. . . . The content of Yoggerst's speech was clearly about her relationship with the Director, a matter of no public concern; the fact that she spoke at a time when the Director's continued tenure in office was a matter of public interest does not alter this characterization." 739 F.2d at 296 (emphasis added) (citation omitted). Thus, the result in *Yoggerst* was dictated by the central principle enunciated in *Connick*: the Constitution "does not require a grant of immunity for employee grievances not afforded by the First Amendment to those who do not work for the State. . . . [T]he First Amendment does not require a public office to be run as a roundtable for employee complaints over *internal office affairs*." *Connick*, 103 S. Ct. at 1690, 1691 (emphasis added).

Unlike Yoggerst's comment, Ardith McPherson's remark had no direct bearing on internal office affairs and was made in her role as citizen rather than in her role as a public employee: her assassination remark was made in the context of a discussion of Reagan administration policies. This distinction may strike some as unduly artificial, for it is true that an acceptance of political assassination, like acceptance of the illegal overthrow of the government, reflects a generalized disloyalty to the very principles on which our public institutions operate. Any government official would properly be quite distressed to find his subordinates expressing such disloyalty, and we acknowledge that there are arguments for the proposition that the first and fourteenth amendments, properly interpreted, do not require government agencies to employ persons who are opposed to the fundamental principles on which our government is based. The Supreme Court, however, has rejected these arguments and foreclosed our consideration of them. *See, e.g., Keyishian v. Board of Regents*, 385 U.S. 589 (1967) (state may not constitutionally bar employment as public school teachers to persons who knowingly belong to organizations seeking the unlawful overthrow of the government); *Connick*, 103 S. Ct. at 1688-89 (reviewing related cases and reaffirming *Keyishian*).

[6] The difficulty with the government's position in this case, however, is that McPherson's duties were so utterly ministerial and her potential for undermining the office's mission so trivial. McPherson was one of about a dozen clerk-typists working in a closed room. She was not a law enforcement officer and she had none of the discretion or power associated with that position. Her job did not bring her into contact with the public, and the district court was not persuaded that she had any access to sensitive or important files. Were any of these factors different, we would have a different case. But in these distinct circumstances, we cannot say that McPherson could constitutionally be fired for her expression of political opinion. Absent evidence that a government employee's views are inconsistent with the mission of the employing agency *and* with the employee's role in that agency, tolerance is required. A large body of first amendment jurisprudence is built on the proposition that political liberty will best be secured in the long haul if the government tolerates as much diversity of opinion as its responsibilities will allow. Our first amendment jurisprudence is a boast that in a free society foolish ideas will fall of their own weight. The ideal of tolerance is sometimes sorely taxed in practice—when that happens, there is all the more reason to recall its long-term benefits. However ill-considered Ardith McPherson's opinion was, it did not make her unfit for her lowly job in Constable Rankin's office.

REVERSED and REMANDED for determination of an appropriate remedy.

BEST AVAILABLE COPY